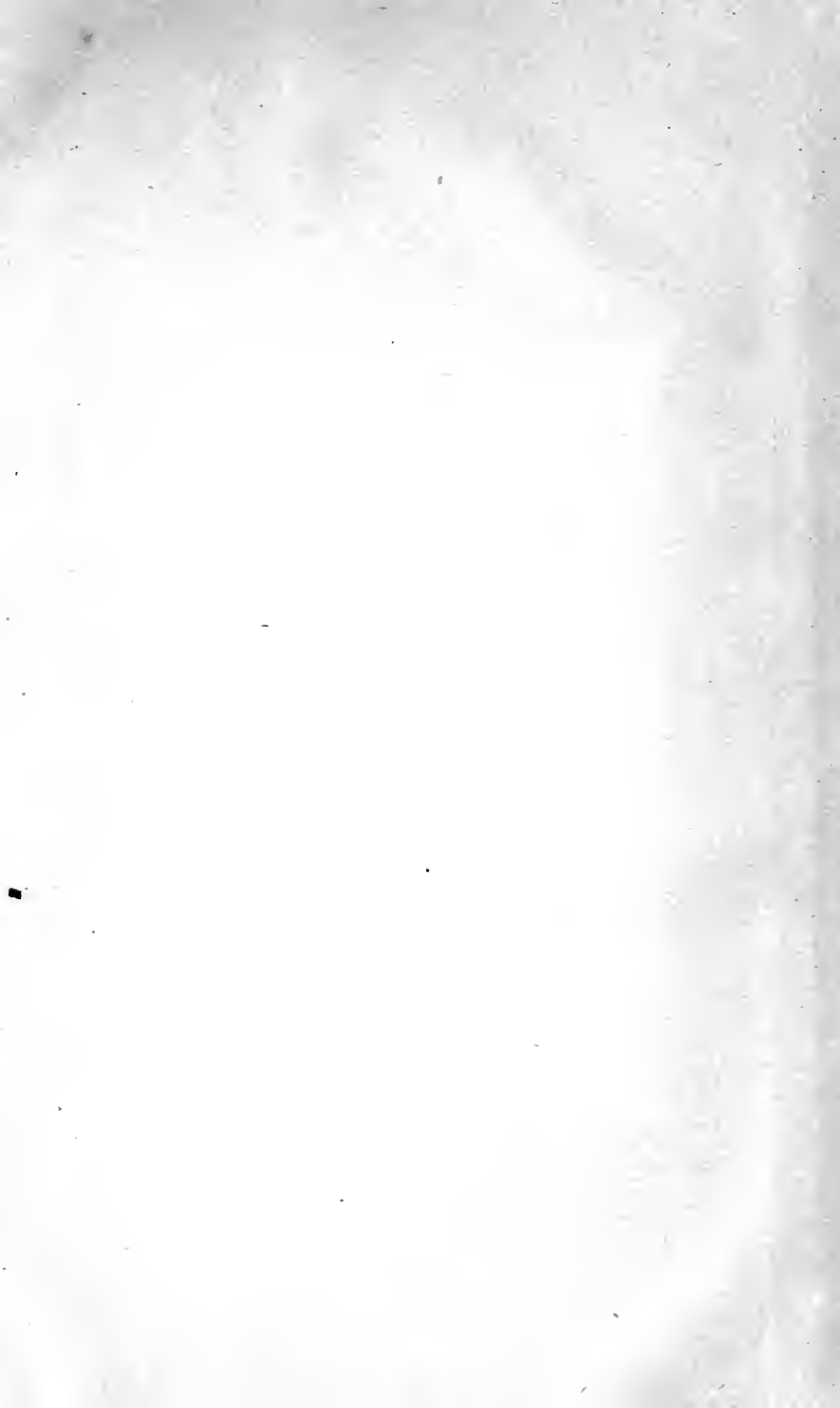






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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT, & WM. RAWLE, JUN.

VOL. XIV.

PHILADELPHIA:

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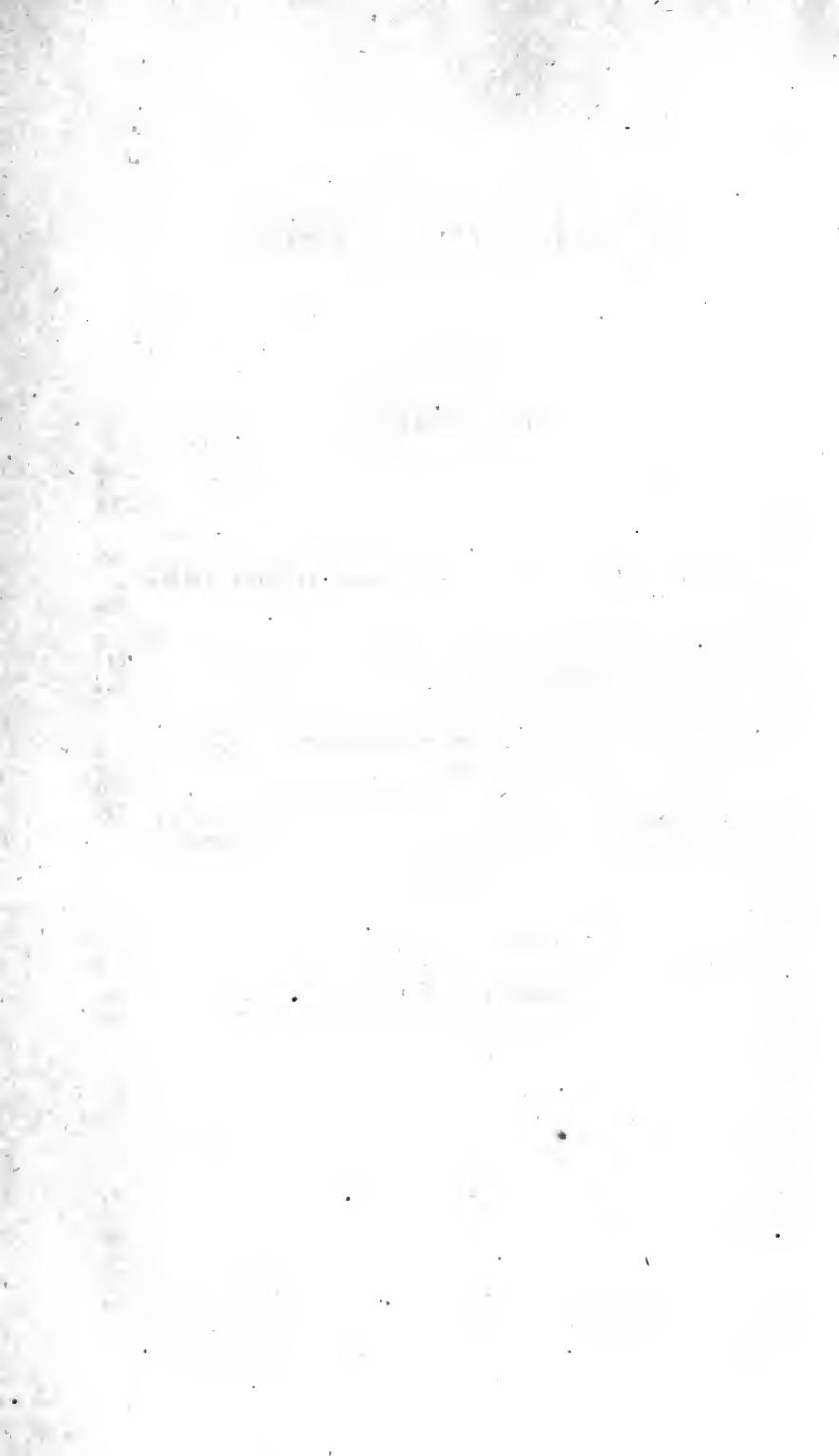


TABLE OF CASES.

A.		Case of the Division of Ma-	
Abington Township, Case		cungie Township,	67
of a Road in,	31	Case of M'Grew's Appeal,	396
Albert, Riddle v.	341	Case of a Road in Abington	
Alexander, The Common-		Township,	31
wealth v.	257	Case of a Road from Herr's	
Anderson v. Reynolds,	439	Mill, &c.	204
Appeal of Ann M'Glinsey,		Case of a Road, &c. in the	
Case of,	64	Borough of Mercer,	447
Appeal of John Withers,	185	Clarke v. Vankirk,	354
Asslin, Hamilton v.	448	Cohen, Sheepshanks v.	35
Ayres v. Fisher,	112	Commonwealth v. Alexan-	
		der,	257
B.		_____ Dunn v.	431
Bailey v. Bailey,	195	_____ v. Reigart,	216
Bank of Washington, Bar-		_____ v. Shaw,	9
rington v.	405	_____ Smith v.	69
Barnes v. Warder,	115	_____ v. Willis,	398
Barr, Neff v.	166	Cooper, M'Dowell v.	296
Barrington v. The Bank of		Cope v. Humphreys,	15
Washington,	405	Crawford, Jackson v.	290
Bitzer's Executor v. Hahn,	232	Crawford, Welsh v.	440
Bombay v. Boyer,	253	Curcier v. Pennock,	51
Boyer, Bombay v.	253		
Boyer v. Kendall,	178	D.	
Boyer v. Potts,	157	Doebler v. Fisher,	179
Boyer, Worman v.	212	Dubarry, Bredin v.	27
Brackenridge, Thompson v.	346	Dunn v. The Common-	
Bredin v. Dubarry,	27	wealth,	431
Brenner, Lighty v.	127	Dwilling, Miller v.	442
Bulkeley, Gordon v.	331		
C.		E.	
Campbell, Frederick v.	293	Eisenhart v. Slaymaker,	153
Case of the Appeal of Ann		Elliott, M'Eleary v.	242
M'Glinsey,	64	Ellmaker, Reigart v.	121
		Estep v. Hutchman,	435

F.		Kellogg v. Krauser,	137
Fisher, Ayres v.	112	Kendall, Boyer v.	178
Fisher, Doeblen v.	179	Kern, Rerick v.	267
Foster v. Sweeny	386	Kerr v. Sharp,	399
Frederick v. Campbell,	293	King, Stubbs v.	206
Funston, Kitchen v.	337	Kirby, Moyer v.	162
G.		Kitchen v. Funston,	337
Gallagher, Scott v.	333	Krauser, Kellogg v.	137
Garven, Vanderslice v.	273	L.	
Gest, Way v.	40	Landon, Williams v.	338
Gibbons, Lee v.	105	Lee v. Gibbons,	105
Good, Rush v.	226	Leet, Ives v.	301
Gordon v. Bulkeley,	331	Leighty v. The Susquehan-	
Gratz v. Phillips,	144	na and Waterford Turn-	
Grey, Wilkinson v.	345	pike Company v.	434
Groff, The President of the		Lessee of Macclay, Work v.	265
Orphans' Court of Dau-		Lighty v. Brenner,	127
phin county v.	181	Lippencott v. Warder,	115
H.		Lowmarter, Sweigart v.	200
Hahn, Bitzer's Executor v.	232	Lucas, Hise v.	209
Hain v. Kalbach,	159	Lutz, Munderbach v.	125
Hamilton v. Asslin,	448	Lutz's Administrator, Mun-	
Hawk, Sheets v.	173	derbach v.	220
Herr's Mill, &c., Case of a		Lybrand, Hinchman v.	32
Road from,	204	Lyon v. The Huntingdon	
Hill v. Williams,	287	Bank,	283
Hinchman v. Lybrand,	32	M.	
Hise v. Lucas,	209	Macungie Township, Case	
Hix, Reigart v.	134	of the Division of,	67
Humphreys, Cope v.	15	Martin v. Mathiott,	214
Humphreys, Johnston v.	394	Mathiott, Martin v.	214
Humphreys, Pearce v.	23	Mazurie, Roberjot v.	42
Huntingdon Bank, Lyon v.	283	M'Almont v. M'Clelland,	359
Huston v. Mitchell,	307	M'Brier, Miller v.	382
Hutchman, Estep v.	435	M'Clelland, M'Almont v.	359
I.		M'Corkle, Weaver v.	304
Irvine v. Kean,	292	M'Coy, Turk v.	349
Irwin, Wilson v.	176	M'Dowell v. Cooper,	296
Ives v. Leet,	301	M'Dowell v. Tyson,	300
Jack, Shaeffer v.	426	M'Elear v. Elliott,	242
Jackson v. Crawford,	290	M'Grew's Appeal, Case of,	396
Johnston v. Humphreys,	394	M'Junkin, Ross v.	364
K.		M'Kee v. Stannard,	380
Kalbach, Hain v.	159	Mercer, Case of the Road,	
Kean, Irvine v.	292	&c. in the Borough of,	447
		Miller v. Dwilling,	442
		Miller v. M'Brier,	382

TABLE OF CASES.

vii

Mitchell, Huston <i>v.</i>	307	Sheets <i>v.</i> Hawk,	173
Moore <i>v.</i> Smith,	388	Skelley, Vickroy <i>v.</i>	372
Moyer <i>v.</i> Kirby,	162	Slaymaker, Eisenhart <i>v.</i>	153
Munderbach <i>v.</i> Lutz,	125	Smith <i>v.</i> The Common-	
Munderbach <i>v.</i> Lutz's Ad-		wealth,	69
ministrator,	220	Smith, Moore <i>v.</i>	388
N.		Stannard, M'Kee <i>v.</i>	380
Neff <i>v.</i> Barr,	166	Steele <i>v.</i> Thompson,	84
Nicholson, Wickersham <i>v.</i>	118	Steer <i>v.</i> Steer,	379
O.		Steinman <i>v.</i> Saunderson,	357
Overton <i>v.</i> Tracey,	311	Stubbs <i>v.</i> King,	206
P.		Susquehanna and Water-	
Pearce <i>v.</i> Humphreys,	23	ford Turnpike Company,	
Pennock, Curcier <i>v.</i>	51	Leighty <i>v.</i>	434
Phillips, Gratz <i>v.</i>	144	Sweeney, Foster <i>v.</i>	386
Potts, Boyer <i>v.</i>	157	Sweigart <i>v.</i> Lowmarter,	200
President of the Orphans'		T.	
Court of Dauphin County		Thompson <i>v.</i> Brackenridge,	346
<i>v.</i> Groff,	181	Thompson, Steele <i>v.</i>	84
R.		Tompkins <i>v.</i> Saltmarsh,	275
Reigart, The Common-		Tracey, Overton <i>v.</i>	311
wealth <i>v.</i>	216	Turk <i>v.</i> M'Coy,	349
Reigart <i>v.</i> Ellmaker,	121	Tyson, M'Dowell <i>v.</i>	300
Reigart <i>v.</i> Hix,	134	V.	
Rerick <i>v.</i> Kern,	267	Vanderslice <i>v.</i> Garven,	273
Reynolds, Anderson <i>v.</i>	439	Vankirk, Clarke <i>v.</i>	354
Riddle <i>v.</i> Albert,	341	Vickroy <i>v.</i> Skelley,	372
Roberjot <i>v.</i> Mazurie,	42	W.	
Ross <i>v.</i> M'Junkin,	364	Warder, Barnes <i>v.</i>	115
Rush <i>v.</i> Good,	226	Warder, Lippencott <i>v.</i>	115
S.		Warfel, Shank <i>v.</i>	205
Saltmarsh, Tompkins <i>v.</i>	275	Way <i>v.</i> Gest,	40
Saunderson, Steinman <i>v.</i>	357	Weaver <i>v.</i> M'Corkle,	304
Scott <i>v.</i> Gallagher,	333	Welsh <i>v.</i> Crawford,	440
Schuylkill Navigation Com-		Wickersham <i>v.</i> Nicholson,	118
pany, Shrunk <i>v.</i>	71	Wilkinson <i>v.</i> Grey,	345
Shaeffer <i>v.</i> Jack,	426	Williams, Hill <i>v.</i>	287
Shank <i>v.</i> Warfel,	205	Williams <i>v.</i> Landon,	338
Sharp, Kerr <i>v.</i>	399	Willis, The Common-	
Shaw, The Commonwealth		wealth <i>v.</i>	398
<i>v.</i>	9	Wilson <i>v.</i> Irwin,	176
Shrunk <i>v.</i> The Schuylkill		Withers, Appeal of John,	185
Navigation Company,	71	Work <i>v.</i> The Lessee of	
Sheepshanks <i>v.</i> Cohen,	35	M'Clay,	265
		Worman <i>v.</i> Boyer,	212



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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1823.

[PHILADELPHIA, JANUARY 17, 1826.]

The COMMONWEALTH *against* SHAW and others.

MOTION FOR A NEW TRIAL.

By the erection of *Fairmount* dam, in the river *Schuylkill*, a rock just below the dam, that had formerly been private property, and above low water mark, became surrounded at all times by water, and was dry only at low tide, and a few hours before and after: *held*, that it still remained the property of the former owner, and that it was not common property, where all persons might stand and fish with hoop nets.

Robert Shaw and others, defendants, were indicted in the Court of Quarter Sessions of *Philadelphia* county, for a riot, and the indictment being removed to this court by *certiorari*, was tried before Mr. Justice GIBSON, at *Nisi Prius*, and the defendants were convicted. It now came before the court, on a motion by the defendants for a new trial, on the ground of a misdirection by the judge, in his charge to the jury.

The material facts on which the charge was given, were stated to be as follows: The place where the riot happened, was at and near a rock in the navigable water in the river *Schuylkill*, just below the dam near *Fairmount*. Before the erection of that dam, the rock stood on the main land, on the western side of the river, being above the low water mark, and part of the estate of *Phæbe Emlen*, by a lease from whom, the said *Robert Shaw* claimed. But in consequence of the erection of the dam, the land between the rock and what is now the fast land was washed away, and the rock itself is overflowed, except at low water, and some hours before and after it. *John Shrunk* and others, fishermen, who were the pro-

(The Commonwealth v. Shaw and others.)

secutors, claimed the right of standing on this rock, for the purpose of fishing. *Shaw* forbade them, ordered them off, and endeavoured to force them off, in consequence of which a riot ensued. The judge, after remarking on the evidence, and the law, proceeded in his charge, as follows: "Taking for granted that the spot in controversy was originally within the low water mark, *Phæbe Emlen* had a right to reclaim it, by erecting a wall, or fence; or otherwise, to take possession by some tangible and notorious boundary, and this would exclude all others. This was all her right, and *Shaw* can have no more. At the time of the riot, this rock was surrounded by water, and not to be reached except in boats. *It is now as much subject to the right of the public as any other part of the river.* If so, these men had the right of fishing there, and *Shaw's* attempt to dislodge them was unlawful." The defendants were convicted in consequence of this charge, and the question now was, whether *Shaw* had not a right to the exclusive use of the rock.

C. S. Coxe and *Tilghman*, for the defendants. It is not denied that *Phæbe Emlen* had property in this rock before the erection of the dam at *Fairmount*, under *William Smith*, to whom a patent issued for five hundred acres of land, including this rock, on the 31st of *December*, 1684. *Shaw* had a lease from her; and he stood on this rock and ordered the prosecutors off. It is above the ancient low water mark, and is now dry from two to three hours every tide. It has been surrounded by water at all times, and placed under water at flood tide by the act of man; by the erection of the dam a little above, under the authority of the *Schuylkill* Navigation Company. The property and possession of *Miss Emlen*, have never been divested by the act of assembly, nor by any principle of law. By the act of the 8th of *March*, 1815, to authorize the making the *Schuylkill* navigable, (6 *St. Laws*, 257,) sec. 9, 10, 11, the property of individuals is only taken away so far as is necessary to open the navigation of the river; in all other respects to remain as before. The owner is to have damages for the injury done him; and in estimating these damages regard is to be had to the benefit he will derive from the improvement. This rock is a distinct property, capable of designation, and is of value: and being no way necessary to the company for the purposes the act had in view, it stands unaffected by the legislature as to the right of property. Then on the general principles of law applicable to rivers, the result is the same. If a river cuts off part of a man's land and makes it an island, the property of the island remains in the former owner. *Swift's System*, *Conn. Laws*, 342. The civil law is to the same effect as the common law. *Cooper's Just.* 74. *Harg. Law Tracts*, 15. 2 *Bl. Comm.* 261. *Vattel B. 1. c. 22, p. 121, sec. 268. Ib. p. 122, sec. 271. Ib. p. 122, 123, sec. 273.*

P. A. Browne and *T. Sergeant*, contra. The prosecutors are

(The Commonwealth v. Shaw and others.)

contending for the common right of fishing in a navigable river, in tide water, a right which is secured to them by the common law, *Willes*, 268, 6 *Mod.* 73, 4 *Burr.* 2164, 2 *Binn.* 275; and in this river, by the special provisions of the act of the 9th of *March*, 1771, 1 *Sm. Laws*, 314, the fourth section of which provides, "that any person or persons may fish with hoop nets in the said river, as if this act had never been made." It was in the attempt to deprive the prosecutors of the right of fishing, with hoop nets, on and near the rock in question, that the defendants committed the riot of which they were convicted. As to soil newly covered with water by a change of the course of a river, or an enlargement of it, so long as such soil remains covered, it partakes of the same nature as the old bed of the river. The new river is subject to all the rights of navigation and fishing vested in the public, though the former owner, if he can, may reclaim it, by a wall or building that shall exclude the water. Where a river, says *Vattel*, changes its course, without going out of the same state, it continues to belong to the same master as before: the new soil, over which the river takes its course, is lost to the proprietor, because all the rivers in the country belong to the public. *Vattel*, B. 1, c. 22, sec. 270. And the law is the same as to lakes. *Ib.* sec. 275. *HALE* holds that when the sea overflows private grounds, the jurisdiction of the admiral vests there; but the owner has the right of reclaiming by building. *Harg. Law Tracts*, 16. This rock being at all times surrounded by water, cannot be distinguished from other rocks of the river: it partakes of the character of being part of the river. It may be used by navigators like other rocks in the old bed of the river to land on, or to fasten their boats to, or by fishermen. It would be inconvenient to subject it to a different rule from other rocks in the river. The former owner has a right to compensation from the company for the loss of it, if it has any intrinsic value: and the right of it vests in the company, as part of their acquisition by the act. Under the authority given by the act of the 8th of *March*, 1815, to blow up rocks in the river, they might remove it at their will and pleasure. It does not partake of the character of an island. There is no instance of a rock being granted by the commonwealth; islands are granted only when they are susceptible of cultivation.

TILGHMAN, C. J., (after stating the case, delivered his opinion, as follows:) It is granted, that *Phæbe Emlen* had a title under *William Smith*, to whom a patent for five hundred acres of land, including this rock, issued on the 31st of *December*, 1684. Also, that this rock was severed from the fast land, in consequence of the erection of the *Fairmount* dam, by the *Schuylkill* Navigation Company. This company was incorporated, by an act passed the 8th of *March*, 1815, (6 *St. L.* 257,) and had authority to improve the channel of the river, or to open, or

(The Commonwealth v. Shaw and others.)

change it, or make a new channel; also to cut, break, and remove all trees, *rocks*, stones, earth, gravel, or other material, or to make use of such timber, rocks, stones, &c. &c., in the construction of their works, and to form, or set up any dams, locks, or other devices necessary or proper for accomplishing their object, viz, the rendering of the river navigable. If any person was injured by the erection of these works, the act prescribes the mode of assessing the damages, in case the person injured and the company could not agree on the compensation; and provides, that those who assessed the damages, were to have regard to the advantages which the person complaining, might derive from the improved navigation of the river. This company might enter into, and occupy, any land necessary for the erection of locks, sluices, or dams, making compensation to the owners, as they might agree, or paying the damages assessed as aforesaid, in case of non-agreement. But there is nothing in this act, which authorizes the company, to occupy any land, except what was necessary for their works. The rock in question was not necessary for their works, being below the last dam in the river, and in tide water; neither has the company any claim to it, or any desire to occupy it. The dispute is between *Shaw*, (the lessee of *Phæbe Emlen*,) and those persons, who, considering the rock as *public property*, assert their right to enter on it, as common to all the citizens of the state. But there is this great difference between this rock and others, that the late proprietaries of *Pennsylvania*, under whom the commonwealth claims, had granted it, for value received, but had not granted the others. *Phæbe Emlen* once had title to it, beyond doubt, and I cannot perceive in what manner her title was divested. Suppose, that instead of a rock, the river had cut off a valuable point of land, and made an island of it, can any one doubt that her title would have remained good? And where is the difference between an island and a rock. One may be as valuable as the other, and the present dispute proves that this rock is valuable as a fishery. That the title to the rock remained in *Phæbe Emlen*, is so plain, that it is almost superfluous to cite an authority on the point. Yet I will mention one, in *Coop. Justinian*, 75, (*Book 2, Tit. 1, sec. 22*,) "If a river divides itself, and afterwards unites again, having reduced a tract of land into the form of an island, the land itself continues to be the property of the former owner." When the channel of a river is enlarged, from whatever cause, it becomes subject to the rights of the public. And one of those rights is, a common right of fishery. All citizens, therefore, had a right to make use of the enlarged channel, caused by the *Fairmount* dam, provided no injury was done to private property. They might go in their boats and fish, whenever the water flowed, but had no right to stand on an island which had been granted. They might pass over *this rock* whenever the water overflowed it, but had no right to *stand on it, for the purpose of fishing*. It is

(The Commonwealth v. Shaw and others.)

unnecessary to consider how the law would be, if it were impossible to distinguish this from other rocks never granted, and therefore remaining public property; because *Shaw* gave notice that it was his, took his stand on it, and warned the fishermen off. I cannot think it was incumbent on *Phæbe Emlen*, or those claiming under her, to enter and take possession, after the rock was severed from the fast land, because *the possession was never out of her*. In this, it appears to me, that the judge's charge went too far in favour of the commonwealth; and as it led, no doubt, to the conviction of the defendants, I am of opinion that a new trial should be granted.

GIBSON, J. The difficulty here is not so much in the law as in its application to the facts. The ownership of land bounded by a navigable river undoubtedly extends to low water mark; and although the gain or loss which arises from alluvion or detrition is permanent, yet where a part is added or taken away by an avulsion, no property is permanently gained in the part added, or lost in the part taken away. Thus the surface, laid bare by a sudden recession of the water, nevertheless remains potentially a part of the channel, and the public may regain its rights over it by again causing the water to flow on it; and, on the other hand, where a part of the bank is deluged, the owner may regain it by artificial means; but, until he do regain it, the part so deluged will be subject to the rights which the public may exercise in any other part of the river. While it remains overflowed, it has the character and incidents peculiar to the bed of a navigable river; and the right to reclaim, is the only one which the owner may exercise in regard to it. On this last principle, (to establish which requires no better authority than the treatise of Lord HALE, in *Hargrave's Law Tracts*,) I found my opinion, without regard to the rights which the *Schuylkill* Navigation Company may be supposed to have acquired in the place in question. Now let us advert to the facts. Before the erection of the dam, the rock in question was partly buried in the mud, which was left bare at low water, and it was consequently included in Miss *Emlen's* boundary; but in consequence of the water, which has ever since been turned on this part of her land, it is now distinctly in the bed of the river, and at a considerable distance from the shore. Its surface is less than twenty feet in diameter; a part of which is a few inches above the surface at low tide, and continues bare between two and three hours in the twenty-four, but at high tide is six feet under water: and the question is, whether it ought to be considered a part of the bed of the river or of Miss *Emlen's* farm. I admit that where a part of the bank of a river is turned into an island, either suddenly or slowly, the title of the owner to it is not extinguished; and if there were any thing here to give this rock the character of an island,—if there were any thing in its present appearance that it had once been part

(The Commonwealth v. Shaw and others.)

of the bank,—or, in short, any thing to distinguish it from the rocks and stones which form the original bed of the river, I should hold that Miss *Emlen* had a right to occupy it exclusively. I say occupy; for I do not deny that she has a latent right of property in it. She might lawfully cleave it for the garnets which it contains, or use the fragments for building, or any other purpose; but she might do the same in respect to those rocks which are covered at low water, and which therefore are indisputably a part of the channel. The right of occupancy, therefore, and not property in the thing, is the criterion; and if the place be a part of the channel, she can exercise no other right over it than over any other part of the river. But it is impossible to treat this rock as an island. The commonwealth would not grant it as such, in its present condition; and although the property in a thing which was granted, while it was the legitimate subject of a grant, will not be divested by a change of its condition, it may undoubtedly be suspended; and the policy of the state, in uniformly refusing to permit naked rocks or sand bars to become the subjects of an office right, ought to have a direct and powerful influence in an inquiry as to what shall be considered as properly the subject of private occupancy, and what subservient to the public rights of navigation and fishery. I perceive no reason to uphold the claim of Miss *Emlen* to the occupancy of this rock, which would not equally uphold her claim to an occupancy of every other rock or stone within the limit of her ancient boundary, which presents an inch of its surface above low water mark. But the maxim *de minimis* is appropriate to either. The foundation of the public right of occupancy, whilst the riparian owner permits his land to be inundated, is the impossibility which exists, of distinguishing it from the original channel, and the danger which those who use the river would consequently incur of becoming answerable for an involuntary trespass. Nor is actual notice of the ancient boundary sufficient to displace the occupancy of the public, who would be exposed to imposition, if they were bound to obey, on being warned by the owner. The public are entitled to better assurance than the mere word of the owner, as to the locality of the former land marks; and the only effectual way of asserting his claim, therefore, is to restore it to its former condition. It is certain that personal notice is insufficient, in respect of a part which is covered at low water, and it must be equally so in respect of a rock, which is conceded to be subject to the rights of the public while covered with water, and to be treated as a part of the bed of the river. I therefore view the fact, that the prosecutors were previously warned by the defendants to quit the rock, as altogether immaterial. Every citizen has a right to land on a barren rock in the bed of a navigable river, and use it as part of the public highway; and, if this be such, the defendants were undoubtedly culpable. But the admission that the public have a right of way over this rock during the time it is covered with

(The Commonwealth v. Shaw and others.)

water is decisive of the question; for it is impossible to treat it as a part of Miss *Emlen's* farm and the subject of private occupancy for three hours, and a part of the public highway during all the rest of the twenty-four, or to insist that the respective rights of the owner, and of the public, shall alternate with the ebb and flow of the tide. The common law maxim, *cujus est solum*, is adverse to such a state of things; and if Miss *Emlen's* latent right of property be sufficient to draw to it the right of possession when this rock is bare, it must necessarily have the same effect when it is covered with water; which is not pretended. For these reasons I am of opinion that the rule to show cause should be discharged.

DUNCAN, J., concurred with the Chief Justice, and gave his reasons verbally.

New trial granted.

[PHILADELPHIA, JANUARY 9, 1826.]

COPE against HUMPHREYS and others.

IN ERROR.

After the lapse of twenty years, a judgment is presumed to have been satisfied, unless there are circumstances to account for the delay.

If there are no such circumstances, it is not the duty of the court to submit the question, as an open one, to the jury. Satisfaction of the judgment is a presumption of law upon the facts.

If the original judgment was against several defendants, and on a *scire facias post annum et diem* the return as to one of the defendants is, *nihil habet*, and judgment is entered against him by default, this is not a circumstance to affect the presumption of payment.

THIS was a writ of error to the Court of Common Pleas of *Montgomery* county, in which the plaintiff below was the plaintiff in error.

The suit was a *scire facias* to revive a judgment brought by *Thomas P. Cope*, against *David Humphreys*, *Owen Humphreys*, and *Thomas Humphreys*, administrators of *Thomas Humphreys*, deceased. The original judgment was recovered on the 9th of *April*, 1800, by *Thomas P. Cope*, against *Thomas*, *David*, and *Owen Humphreys*, for seven hundred and thirty-four pounds, four shillings and eleven pence. A *scire facias* against the present defendants was issued on the 13th of *August*, 1822, to *August* Term, 1822, which was returned "*nihil*." An *alias scire facias* was issued on the 21st of *August*, 1822, to *November* Term, 1822, the return to which was, "made known to *Thomas Humphreys* and *David Humphreys*, and, as to *Owen Humphreys*, *nihil habet*." A special appearance was marked for *Thomas* and *David*

(Cope v. Humphreys and others.)

Humphreys April 14th, 1823, and the plea of payment with leave, &c., entered. On the 18th of *August*, 1823, judgment was entered against *Owen Humphreys* for want of appearance. On the 26th of *January*, 1825, the cause was tried and a verdict given for the defendants. On the trial of the cause, the plaintiff gave in evidence the record of the judgment, of *February* Term, 1800. Also, the *scire facias* to *August*, 1822; and the *alias scire facias* to *November*, 1822. And the defendants examined *Reese Thomas*, who testified as follows: *Thomas Humphreys*, the defendants' intestate, lived in *Lower Merion* township, in *Montgomery* county, about nine miles from *Philadelphia*, on the *Lancaster* road: he died about three or four years ago. *David Humphreys* is living, and keeps the turnpike gate, No. 2, in the county. He did not know *Owen*. *Thomas* was a very old man,—he was a man of property, and owned real estate.

The court charged the jury as follows:

“This is a *scire facias* to revive a judgment, entered on the 9th of *April*, 1800, twenty-four years ago last *April*, and, according to the evidence, the first step that we know of to assert a claim, or carry it into execution, or to demand any thing under it, was a *scire facias* to *August* Term, 1822, returned *nihil*, which, had it issued within twenty-one years, would probably have been a sufficient assertion of claim, to take the case out of the presumption from length of time.

“The defendant has pleaded payment, and relies for his proof of this defence on the lapse of time between the entering of judgment and doing any act to carry it into effect. It is certainly true, that a judgment may be discharged by payment; had a payment been made and a receipt given, such receipt might have been given in evidence, to show that the judgment was satisfied. But after great length of time, owing to the great difficulty of preserving receipts, or other evidence of payment, it is reasonable that payment should be presumed from length of time. That in respect to a bond, after twenty years from the time of payment upon it, or demand made, a presumption of payment arises, seems to be admitted. So, after twenty years, a mortgage will be presumed to be satisfied. Neither in *Great Britain*, nor here, is there any statute providing for this limitation. In *England*, although the case was not included in it, the decisions evidently had reference to the statute of *James*. If the law presumes a bond or mortgage paid after twenty years, can any sound reason be assigned why a judgment should not be subject to the same rule? Is there in a judgment any greater sanctity than in a mortgage?

“When a mortgagee, not in possession, has not received any payment for twenty years, or done any act under the mortgage to preserve his claim, the law presumes payment. When he is in possession, no presumption indeed arises, because, being in the perception of the profits, they are by law appropriated to pay off

(Cope v. Humphreys and others.)

the mortgage. It is not unusual to give judgment bonds and mortgages: the former are entered up, and the latter are recorded. Against a mortgage thus entered, a presumption of payment from twenty years arises. What reason is there it should not operate so in regard to a debt secured by a judgment?—Of a judgment which has been suffered to lie dormant twenty years, payment may be presumed. Forbearance for so long a time unexplained, is a circumstance from which the jury may and ought to infer, that the judgment has been satisfied.

“The court apply the same principle to a judgment; a judgment which has been suffered to lie dormant for twenty years. It is but a presumption, but it is a legal presumption, governing the court and jury. It may indeed be repelled by circumstances, such as payment, promise to pay, &c. But in the absence of all evidence, as here, where the delay is unexplained by any circumstances, and more particularly, after the death of the obligor, the legal operation is, that the debt is paid. I state the law thus strongly, and without equivocation, that if there be any doubt upon the subject, it may be now settled, that the people may be informed, if such be the law, that the same presumption of payment, applicable to bonds and mortgages, is not the rule as to judgments. It is true, that no authority of a record has been cited, but the analogy to the cases of bonds and mortgages is so strong as not to be mistaken. It is said that this is a record; so is a mortgage a record, not of a court, but under the charge of an officer of equal responsibility with the prothonotary, who enters the judgments of the court. His exemplifications are evidence. The law even presumes a common recovery after a certain length of time, for the purpose of effecting justice. Upon the whole, the jury will receive the law from the court, as it is laid down, without being led away by any thing that has been said about the respective parties, who are making and resisting the claim.”

The plaintiff excepted to this opinion.

The errors now assigned were,—

1. The judge erred in charging the jury, that the lapse of twenty years afforded a legal presumption that the judgment was paid.

2. The judge erred in not leaving it to the jury, that a judgment by default against one of the defendants, after a return of two *nihilis* as to him, to two writs of *scire facias*, was a circumstance to repel the presumption of payment from lapse of time.

3. The court refused to leave the facts of the case to the jury.

Price and *Kittera*, for the plaintiff in error, now argued the errors assigned.

1. They contended, that there was no presumption in law that a judgment was paid after twenty years. At common law, payment was not a good plea to a *scire facias* on a judgment: the statute 4 *Ann. c. 16*, gives the plea where the money is paid. No

(Cope v. Humphreys and others.)

matter *in pais* is pleadable to a *scire facias*, except the plea given by this statute. There can be no presumption against a record: it imports absolute verity: it is authentic beyond contradiction; and tried only by itself. There is no authority for the court's decision either in *England* or *Pennsylvania*. On the contrary, the books of practice speak of the modes of proceeding to revive judgments after twenty years. The defendant has a right, if he pays a judgment, to call on the plaintiff to enter satisfaction, and that makes the case of a bond and judgment very different. They cited, *Co. Litt.* 39, a. 117, 268. *Gilb. Ev.* 7. 9 *Johns.* 287. 1 *Chitt.* 481. 5 *Bac. Ab.* 410. *Cowp.* 214. *Tid's Prac.* 1007. 2 *W. Bl.* 995. 6 *Munf.* 282. 3 *Bl. Com.* 559.

2. The judgment by default against *Owen Humphreys* was an admission of the cause of action. *Stra.* 612, 1149. An acknowledgment by one partner takes the case out of the statute of limitations. *Ball on Limit.* 202.

3. The court ought to have left the case to the jury. Circumstances do away the presumption,—such as indorsement of interest on a bond; 2 *Stra.* 826: the unsettled state of the country, 1 *Coxe's N. J. Rep.* 433. Slight circumstances suffice to repel the presumption. 10 *Johns.* 414.

Rawle, jr., contra.

1. This case presents the naked question, whether a presumption of payment of a judgment arises after a lapse of twenty years. Here upwards of twenty-two years had passed. We contend, that the same general rule applies to judgments which operates in other cases. A bond is presumed to be paid after twenty years, 1 *Yeates*, 344; a mortgage, 1 *Mad. Ch.* 417, 246, 3 *P. Wms.* 287, 10 *Johns.* 414, 9 *Wheat.* 497: corporate privileges are not disturbed after twenty years, 4 *Burr.* 1962: a water-right is protected after twenty-one years, 10 *Serg. & Rawle*, 63, 69. We do not deny the record, but say the debt has been paid, and this is an answer to the cases cited as to the efficacy of records. This question is not, however, new: it has already been decided, *Fr. Max. Eq.* 39, No. 10, pl. 5. 2 *South. N. J. Rep.* 721. 2 *Const. Rep. S. Car.* 617. 2 *Rep. Const. Co. S. C.* 146, are all authorities in point; and the allusion to it is strong in 7 *Serg. & Rawle*, 410.

2. The judgment by default against *Owen Humphreys* was not a circumstance which should have induced the court to leave this matter to the jury. It is indeed sufficient, that the court was not asked for their opinion as to the effect of the judgment by default; and a judgment is not to be reversed because the judge has not made all the remarks which the case admitted of, 2 *Serg. & Rawle*, 397. No presumption, however, can arise from a judgment by default on two *nihils*. The defendant not having been summoned did not know of the action, and therefore did not impliedly confess any thing.

(Cope v. Humphreys and others.)

The opinion of the court was delivered by

DUNCAN, J. This case presents three heads of inquiry. The first—Does the presumption of payment of a judgment of more than twenty years' standing, obtain in the same degree as it does on bonds?

2. If there were no circumstances to account for this delay, was it the duty of the court to submit the question, as an open one, to the jury, to draw their conclusion as to actual payment?

3. Was there no circumstance given in evidence to repel the presumption of payment, from length of time, to be left to the jury?

The presumption is admitted to obtain as to bonds and mortgages; but it is said, there is no instance in which payment of a judgment shall be presumed, after a forbearance for twenty years, the record itself importing absolute verity. I have not been able to distinguish judgments from bonds and mortgages. Claims the most solemnly established on the face of them, will be presumed to have been paid after twenty years. The existence of a record may in some cases, and after a long time, be presumed: if that may be presumed, I do not see why its satisfaction may not be presumed. The plea of payment does not infringe the sanctity of the record, but shows that it has answered the purpose of its creation, by a satisfaction of the debt secured by it.

On a bill to foreclose a mortgage, a court of chancery makes the same presumption of facts on the allegation of payment, (*Giles v. Baremore*, 5 *Johns. Ch. R.* 551,) and that without sending it to the jury.

By the common law, a judgment on which no execution was taken out for a year and a day, was not operative as a judgment, on which execution might issue; the party was driven to his original on the judgment. The *scire facias* was given by statute, and it is so far in the nature of an original action, that the defendant may plead to it. In *England* by the rules of practice, which have not been adopted here, if the judgment be above ten years' standing, the plaintiff cannot sue out a *scire facias* without motion in court; and, if above seven years, he cannot without a side bar rule. In the courts of *New York*, leave will not be given to enter up a judgment on a warrant of attorney of eight years' standing without accounting for the delay. 7 *Johns.* 282. Nothing can more clearly evince the strong opinion of courts of justice of the effect of time on judgments than these rules.

As courts would direct a jury to presume payment on a mortgage after twenty years, if they act on the presumption of payment of the debt secured by the mortgage, what good reason can be assigned why, if judgment was obtained on it, the same presumption should not be made? If a man holding a warrant of attorney to confess a judgment on bond, were to forbear for nineteen years to enter up the judgment, would that entry prevent the operation of

(Cope v. Humphreys and others.)

of presumption for any anterior time? The rule of twenty years, by analogy to the statute of *Jac. 1.*, as to the limitation of entry or ejectment, prevailed as to bonds in *Pennsylvania* before any case had occurred under our limitation act, which, gives twenty-one years; but it has been thought best not to depart from the twenty years. Twenty years then is the fixed period. It is the fixed limitation as to all debts, with the exception of trusts, which depend on other principles. It offered an insuperable defence to the debtor: one day beyond it is as much too late as one hundred years. The policy and justice from whence the presumption arises, are particularly applicable to judgments. We all know how often it occurs, that judgments remain without any entry of satisfaction, after the debt has been paid. This frequent occurrence has called for legislative interference, with respect to the lien of judgments limiting them to five years. This consideration recommends the adoption of the presumption as to judgments; for I am satisfied there are more cases of neglect to enter satisfaction when paid, than to cancel a bond when paid. The reasons, justice, policy, and convenience, are the same; and why should not the law be the same? I think it is, and has been so from a pretty early stage, and from the time consistency and form were given to chancery proceedings by that great founder of equity Lord NOTTINGHAM, and followed by the approbation of a no less celebrated chancellor, Lord HARDWICKE. In *Ch. Rep. 78*, a bond of twenty-two years came to the hands of an executor, and forasmuch as the obligee, the testator, had lived till about seven or eight years past, and never demanded any interest, the chancellor considered the bond had been satisfied, and decreed the same to be delivered up; and if judgment was entered thereon, the same to be vacated. To this decree Mr. *Francis* has given the weight of a maxim in chancery. *Fr. Max. in Eq. Max. 10, No. 5*. This was long before the statute of *Anne*, for the amendment of the law, which first gave the plea of *solvit post diem*. Since that statute, as it would be a good defence at law, chancery has refused to order satisfaction to be entered, merely on presumption from length of time. But in *Kemys v. Ruscomb, 2 Atk. 45*, where a bill was brought against the representatives of a judgment creditor, for entering satisfaction on a judgment of forty-two years' standing, and presumed to have been paid from length of time, Lord HARDWICKE dismissed the bill; for where a judgment is still standing out, and there is no satisfaction on the record, the court will not, merely upon the presumption from length of time, decree it to be satisfied,—especially where the statute for the amendment of the law, allows one to plead payment at law, as it is an old judgment. These cases are directly in point, and there is no *dictum* to the contrary to be found in the books. We may be assured of this, as, if there had been one, the industry of the counsel of the plaintiff in error would have brought it to light. If this presumption

(Cope v. Humphreys and others.)

rests on the assumption of payment from length of time, and the reason of that presumption is, that a man is always ready to enjoy his own, it applies universally to all debts. The cases in the *South Carolina Reports* show that there the presumption is applicable to judgments. Mr. Peake, in his *Treatise on Evidence*, a valuable book (greatly improved in the new edition published in this city by references to *American* decisions,) puts bonds and judgments on the same footing. "Twenty years," says the author, "is presumption of payment of a bond, and the same rule applies to a *scire facias* for execution on a judgment." *Peake's Evid.* 481.

In the reason of the thing, and from authority, it appears to the court, that the presumption of payment existed in this case, unless it was repelled by some circumstances accounting for the delay.

This brings us to the second head of inquiry,—If the delay to prosecute the judgment for more than twenty years has not been accounted for, or any evidence given from circumstances to be left to a jury, from which they might account for the forbearance, was it the duty of the court to submit it as an open question for the belief of the jury, as to the actual payment? On this subject, I need only refer to the opinion of Judge GIBSON, in *Henderson v. Lewis*, 9 *Serg. & Rawle*, 379: "The rule is in the nature of a statute of limitation, furnishing indeed not a legal bar, but a presumption of facts, and, though not conclusive, yet *prima facie* evidence of it; and therefore sufficient of itself to cast the burden of countervailing proof on the opposite party. Where less than twenty years have intervened, no legal presumption arises; and the case not being within the rule, is determined on all its circumstances: among which, the actual lapse of time, as it is of greater or less extent, will have a greater or less operation; and then it is a matter exclusively for the consideration of the jury. But where the legal presumption arises, it would, besides rendering its application in most cases difficult and uncertain, change its very nature and destroy all analogy to the statute of limitations, from which it is derived. The presumption is not subject to the discretion of a jury; they are bound, where it operates at all, to adopt it as satisfactory proof till the contrary appears."

Now, taking the whole charge of the presiding judge together, as it ought fairly to be taken, the court did so charge. If there had been any circumstances, any thing but the lapse of time to charge the jury on, that should have been left to the jury; but where there was none, the presumption of law on that fact is, that the judgment was satisfied. The court did no more, and, if they had done less, they would have committed an error. On the twenty years unexplained, there was nothing to leave to the jury: they had no belief to exercise on it: it is because there are no means of belief or disbelief, the presumption of the fact arises: the presumption holds the place of particular and individual belief. It

(Cope v. Humphreys and others.)

prevails, because the presumption of law is, that the obligor or conuzor in that long time has lost his receipts and vouchers, or the witnesses who could prove the payment might be dead. The jury might not have believed, this court might not believe the fact of payment; but that specific belief is not necessary. For wise purposes the law has raised the general presumption. The laying down any other rule would be destroying all legal presumption. The position of the court below is justified by the opinion of all the judges in *England*, as in *Grantwicke v. Simpson*, 2 *Atk.* 144, it is said, "that the judges have bound it down, as an irreversible rule, that if there be no demand for money due on a bond for twenty years, they will direct a jury to find it satisfied, from the presumption arising from length of time."

The charge, therefore, is free from all error, unless some circumstances were given in evidence to repel this presumption. Without the existence of such circumstances, it was the duty of the court to direct the jury to find it satisfied. No such circumstance has been pointed out, unless it be the one which appears on the face of the record; that is, that one of the conuzors of this judgment had been defaulted on two *nihils* returned. The court was not requested to give any opinion as to the effect of this against the administrators of the conuzors, who pleaded to issue; but if they had been requested to give any opinion on this, it should have been an opinion directly against the plaintiff. It was not a judgment where the defendant had notice to show cause why execution should not issue on the original judgment, when he had removed from the county; for when the sheriff returned, that he had nothing in his bailiwick whereby he could be summoned, this must have been so. It has not the effect of a judgment by confession; or where the party, being notified to show cause, declines it; this, as is contended, admits the fact. The reason of the presumption is, that payment was made and the vouchers lost. An acknowledgment by the party that it was not paid would repel that presumption; but here, how far a confession of judgment, or notice, or suffering judgment to go by one defendant, would affect the others, whose lands are intended to be reached by this proceeding, I am not called on to say. There is no such fact. It is a fiction, when it is supposed that an absent unnotified debtor should bind his co-obligors, because he acknowledged that the debt was not paid, by not appearing to that proceeding of which he had no notice. This fiction would affect the interest of a third person. Fictions of law ought never to work injustice.

There are a variety of circumstances by which the presumption might have been repelled here; but the plaintiff did not attempt any explanation; such as insolvency of the obligors, or a state approaching to it, relationship of the parties, or the absence of the party who has a right to receive the money due. It was the naked case of a judgment of more than twenty years' standing, on which the pre-

(Cope v. Humphreys and others.)

sumption attached with all its force, in which case it was the duty of the court to charge the jury, as they have done. The plaintiff in error has not sustained any of his exceptions, and the judgment stands affirmed.

Judgment affirmed.

[PHILADELPHIA, JANUARY, 9, 1826.]

PEARCE *against* HUMPHREYS.

IN ERROR.

The sheriff is answerable for the sufficiency of sureties in a replevin bond, at the termination of the suit. It is not enough that they were sufficient when they were taken.

Benjamin Humphreys, the plaintiff below and defendant in error, brought this action of trespass on the case against *Cromwell Pearce*, the defendant below and plaintiff in error. The declaration charged, that the said *Benjamin*, on the 1st day of *February*, 1817, was possessed of one wagon, &c. of the value of, &c. of his own proper goods and chattels, and that the said *Cromwell*, on the day and year aforesaid, was high sheriff, &c. and the said *Benjamin* so of the goods and chattels possessed, and he the said *Cromwell* so as aforesaid being high sheriff, &c. the duty of his said office not considering, but contriving, and fraudulently intending the said *Benjamin* of his goods and chattels aforesaid to deprive and defraud, on the day and year aforesaid, at, &c. by colour of his office aforesaid, and under the pretence of a writ of replevin to him directed and delivered, the goods and chattels aforesaid, at, &c. being found, at the plaint of one *Jacob Root*, pretending the same goods and chattels were the proper goods and chattels of the said *Jacob*, and to the said *Jacob* of right to belong, and that the said *Benjamin* had taken the goods and chattels aforesaid, and the same unjustly detained, against sureties and pledges, the goods and chattels aforesaid to be replevied from the possession of the said *Benjamin*, to be delivered to the said *Jacob* did cause and procure, without sufficient surety and pledges, or any sufficient surety, had or taken to prosecute the said suit and plaint of him the said *Jacob*, against the said *Benjamin*, for the caption and unjust detention of the goods and chattels aforesaid, and to make a return of the said goods and chattels to the said *Benjamin*, if a return should be adjudged to the said *Benjamin*, as by the law and custom of the commonwealth of *Pennsylvania*, and the duty of his office, and the tenor of the writ aforesaid, he ought to have done. And whereas afterwards, to wit, on the same day and year aforesaid, at, &c. he the said *Benjamin* was summoned into the Court of Common Pleas of the said county, to appear on the first

(Pearce v. Humphreys.)

Monday of February, then next following, to answer the said *Jacob* of a plea, why he took the goods and chattels aforesaid, and thereupon it was in such manner proceeded, that by the said court it was considered, that the said *Benjamin* should have a return of the goods and chattels aforesaid, to be delivered to him ir-replevisable for ever, which said judgment remains, and is in full force and vigour, not reversed or annulled; and the said *Benjamin* in fact saith, that the goods and chattels aforesaid, to the aforesaid *Jacob*, by reason of the replevin aforesaid, so as aforesaid delivered, to places obscure and unknown were eloigned, whereby they cannot be returned or delivered to the said *Benjamin*, and the said *Benjamin* the goods and chattels aforesaid, by the occasion aforesaid, hath wholly lost, and is without remedy, to the damage of the said *Benjamin*, &c. Plea, not guilty.

On the trial the defendant contended, that in the performance of his duty as sheriff, he executed the replevin as he was commanded; that he did take security, believed to be at that time sufficient, in the reasonable estimation of every one; that this was all that was required of him; and that, therefore, he was not answerable for their proving insolvent at the termination of the replevin suit, nor guilty of any neglect of duty.

The court charged the jury, that the law of *Pennsylvania* is as laid down by the late Judge SHIPPEN, in the case of *Oxley v. Cowperthwaite*, 1 *Dall.* 349, that the sheriff is responsible for the sufficiency of the sureties, at the termination of the replevin suit. When the defendant shall have established his right, the sureties are to prove sufficient, that is, to be found sufficient when their responsibility is required; not merely that they appeared sufficient at the time they were taken, though they soon became insufficient, but the sheriff must take care to have sureties who are sufficient to answer the defendant's purpose, viz. to return the property which he shall have shown to have been taken wrongfully from him.

The court was requested by the defendant's counsel to charge the jury,

1. That, if the jury believe the defendant, as sheriff of *Chester* county, used every necessary and proper precaution in taking good and sufficient sureties in the replevin bond, in the suit of *Root* against *Humphreys*, and if the jury also believe, that at the time the sureties were so taken they were good and sufficient, they ought to find for the defendant.

2. That, under the declaration in this suit, the plaintiff ought not to recover, if the jury are satisfied, that at the time the replevin bond was executed and signed, in the said suit of *Root* against *Humphreys*, the sureties in the said bond were good and sufficient.

3. The plaintiff cannot recover against the defendant, on account of the sureties being insufficient, at the time of the trial of the said

(Pearce v. Humphreys.)

suit of *Root* against *Humphreys*, without having in the declaration declared that the sureties were so insufficient at that time."

Answer, 1. and 2. We cannot charge the jury as requested. The sheriff does not use every necessary and proper precaution, unless he takes surety, which shall prove sufficient, at the end of the replevin suit, and he is liable, if they prove insufficient, whether they were apparently so or not, at the time of executing the bond.

3. If the sureties prove insufficient at the termination of the replevin suit, the plaintiff may well recover on this declaration, which is for taking the chattels, without having sufficient sureties and pledges. The sureties must be able to answer the purposes for which they were intended, or they are not sufficient.

Edwards, for the plaintiff in error.

Tilghman, contra, was not heard by the court.

The opinion of the court was delivered by

DUNCAN, J. The late Chief Justice SHIPPEN, has been properly styled the father of the law of replevin in this state. While President of the Court of Common Pleas, he established certain principles, in conducting the action, and on the responsibility of a sheriff who executes them, thirty-seven years ago, which have prevailed ever since. Indeed, it became necessary, from the structure of our courts of justice, to adopt other rules for the government of this action, than obtained in *England*. In *Weaver v. Lawrence*, decided in 1788, 1 *Dall.* 156, he clearly shows, that there can exist no replevin in *Pennsylvania*, either under the statute of *Marlbridge*, or at the common law. The writ and the action rest on the provisions of the act of 1705, 1 *Smith*, 44. And again, in *Hocker v. Stricker*, 1 *Dall.* 225, it was held, that before goods be remanded, the sheriff ought to allow the defendant in replevin a reasonable time to find security. On a claim of property, this practice supplies the writ *de proprietate probanda*, which does not lie here. Our replevin differs from the writ and action of replevin in *England* in another important respect:—here it lies where a man claims goods in the possession of another; there it is said only to lie in cases of distress, or where there has been a taking of goods out of the possession of him who sues it forth. In *Oxley v. Cowperthwaite*, 1 *Dall.* 349, the principle now controverted by the plaintiff in error, was decided, that the sufficiency of the sureties, at the termination of the action, was the criterion. The mind of that just judge was impressed with the hardship of the rule, and that in this instance the policy of the law bore hard on the officer: yet that would not justify the court in departing from the established principle, that the sheriff takes the pledge in his own name and at his own peril and risk. This certainly was taken to be the law of *England*, when *Oxley's* case was determined, *Gillb. Rep.* 76. 16 *Vin.* 399, pl. 4. *Stat.* 12 G. 2. *Rowan v. Patterson*, 2 *Inst.* 339. Until a late period in *England*, the allegation

(Pearce v. Humphreys.)

in the declaration was general, that the sheriff did replevy and deliver the goods to the plaintiff, without taking sufficient sureties, not alleging that they were insufficient at the time they were taken. *Lill. 37. Browne, 25, 26.* But the latter precedents state, that at the time of their becoming pledges, they were insufficient and totally irresponsible. In *New York* the courts adhere to the ancient law, that the sheriff may be sued without any previous proceedings against the pledges, as the security is taken by the sheriff for his own indemnity, in his own name and at his own peril. *Gibbs v. Bull, 18 Johns. 438.* If I were to be guided by my own sense of justice, without regard to authority, I must own that it would seem to me, that commutative justice would require a different criterion; for as the sheriff would be liable to an action of trespass for removing the goods and delivering them to the plaintiff, when the defendant offers sufficient pledges on the claim of property, and could not justify under the replevin; and that, as the criterion there would be the sufficiency at the time, so it ought to be where he delivers up the goods to the plaintiff in replevin. Their apparent responsibility at the time when he accepted them, would have been the justest rule at first. The sheriff does all he can to make diligent inquiry: he ought not to be bound to know what nobody else knows; and if the rest of the world would trust the security, it appears but reasonable that it should be a sufficient justification to the sheriff, if he consider him as a responsible person; for the presumption is, that the sheriff would be liable if he took, as security, a man who apparently had the strongest foundation, whose circumstances were not suspected by any one, yet if it turned out differently in a lapse of years, before the cause was tried, that he should fail, is throwing an unusual burden on the sheriff. But with all this impression of the hardship, the court thirty-eight years ago adhered to the ancient law, which no supposed hardship would justify a departure from. The decision of *Oxley v. Cowperthwaite*, has ever since been received as the law of the land. The court there said, it was for the legislature to make some provision for an inquiry into the sufficiency of the bail at an earlier stage of the cause. The legislature has not thought proper to change the law: sheriffs have accepted their office with the knowledge of this onerous duty; it would be a bold assumption of power in this court now to relieve them from it, upon any speculative opinions of their own. However hard it may be in this particular instance, the court cannot unbind those whom the law has bound. The security is to the sheriff at his own peril, in his own name, and for his own indemnity: he may take the security as it pleases him, (*Gilb. Rep. 79,*) for he continues responsible to the value of the goods. The judgment is therefore to be affirmed.

Judgment affirmed.

[PHILADELPHIA, JANUARY 9, 1826.]

BREDIN *against* DUBARRY.

IN ERROR.

Plaintiff sold to defendant certain goods; some time after which, the clerk of the plaintiff, who, it was admitted, had authority to give receipts for him, gave to defendant a receipt as follows: "Received, *August* 20th, 1816, of *J. B.*, seventy-three dollars and eighty-two cents, which with goods, &c. returned, *will be in full*,"* and interest account to be adjusted between Mr. *D.* and the said *J. B.*" Held, that in the absence of evidence to the contrary, the agreement was, that the goods should be returned, and the original contract of sale, *pro tanto*, rescinded. A principal who neglects promptly to disavow an act of his agent, who has transcended his authority, makes the act his own.

ERROR to the District Court for the city and county of *Philadelphia*.

James Bredin, the plaintiff in error, was defendant below, and *John Dubarry* was plaintiff below. The action was for goods sold and delivered; the pleas were, *non assumpsit* and payment with leave, &c. On the trial, the plaintiff proved that he sold to the defendant, *Bredin*, certain goods and merchandize on the 20th of *March*, 1815, amounting to four hundred and ten dollars, and on the 19th day of *June*, 1815, goods to the amount of twelve hundred and eighty-six dollars and sixty-five cents, at a credit of six months, and received on account the following sums; viz. on the 16th of *June*, 1815, three hundred dollars; on the 21st of *June*, 1815, one hundred dollars; on the 25th of *February*, 1816, one hundred and twenty dollars; on the 24th of *April*, 1816, eight hundred dollars; and on the 20th of *August*, 1816, seventy-three dollars and eighty-two cents. The proceeds of certain goods said to have belonged to the defendant, sold by *Lisle, Weir*, and Co. at public auction, on the 30th of *January*, 1819, for the account of the defendant, by order of the plaintiff, amounting to seventy dollars and fifteen cents, were also credited by the plaintiff.

The defendant gave in evidence the following receipt, dated the 20th of *August*, 1816, from the plaintiff to the defendant, signed by *John Breban* for the plaintiff, who, it was admitted, was a clerk of the plaintiff, and had authority to give receipts for him: "Received, *Carlisle*, *August*, 20th, 1816, of *James Bredin*, seventy-three dollars and eighty-two cents, which with goods, &c. returned, *will be in full*,"* and interest account to be adjusted mutually between Mr. *Dubarry* and the said *James Bredin*."

The plaintiff then gave in evidence copies of three letters from him directed to the defendant, dated at *Philadelphia*, viz. *November* 22, 1816, *February* 17, 1817, and *December* 20, 1818.

The defendant contended, first, that the receipt was conclusive in favour of the defendant, and that the seventy-three dollars and eighty-two cents, and goods returned, were in full of the plaintiff's

* The words "*will be in full*," in the original receipt, were interlined and crossed out.

(Bredin v. Dubarry.)

demand, excepting the interest account, which was to have been adjusted between the parties. Secondly, that the plaintiff having treated the goods returned as the property of the defendant, he had no right to sell them at auction. Thirdly, that if the plaintiff had a right to sell the goods at auction, as the property of the defendant, he was bound to give the defendant notice of the time and place of sale.

The court charged the jury, that the receipt was not in full of the plaintiff's demand; that it contemplated that both the goods and interest account were to be afterwards adjusted by the parties; and that it did not appear that *Breban* had authority from the plaintiff to take back the goods at first cost or at any other fixed rate, and the defendant was bound to show he had such authority before he could rightfully charge the plaintiff with those goods at first cost, or such fixed rate. Secondly, that the plaintiff had a right to sell the goods at auction, under the circumstances of the case. Thirdly, that the plaintiff was not bound, nor was it material as the case was circumstanced, taking into view the small value of the articles and the remoteness of the defendant's residence, to give the defendant notice of the time and place of sale of the goods; that the rule requiring notice to be given, if there was such a rule in such cases, must admit of reasonable limitations, and the jury, in considering this subject, would take into view the letters which had been given in evidence. To this charge the defendant excepted.

The following were the letters referred to:—

“*Philadelphia, Nov. 22, 1816.*

“*Mr. James Bredin, (Carlisle,)*

“*Sir—Herewith you have a statement of your account with me, the balance of which, amounting to three hundred and two dollars and eighty-three cents, I must request you will forward to me as early as possible in bank paper at par with this city. The goods which you sent to me, remain subject to your order. If you wish that I should dispose of them for your account, according to the present market price, I will endeavour to do for the best of your interest; otherwise you may give directions to some of your friends here to take charge of them. Awaiting your answer, I remain,*

Yours, &c.

Dr.			Mr. James Bredin to John Dubarry,			Cr.
1815, March 20,	To Mdze.	\$410,00	1815, June 16.	By Cash,	\$300,00	
June 19,	Do.	1286,65	" " 21.	"	100,00	
			1816, Feb. 28.	"	120,00	
			" Apr. 24.	"	800,00	
			" Aug. 20.	"	73,82	
					\$1393,82	
		\$1696,65	" Nov. 22.	Bal. due J. D.	302,83	
1816, Nov. 22.	To Balance,	\$302,83			\$1696,65	

(Bredin v. Dubarry.)

*"Philadelphia, Feb. 17, 1817.**"Mr. James Bredin, (Carlisle,)*

"Sir—I wrote to you on the 22d of *November* last, requesting you to forward to me the balance of your account, as therein stated, also informing you that the goods you sent to me were at your disposal. As you have thought proper to let my letter remain unanswered, you will now please to take notice, that by the return of mail I shall expect you to remit the balance which you owe me, as stated in the above-mentioned letter of the 22d of *November* last. Otherwise I shall send your goods to public auction, and credit your account for whatever they may bring.

Yours, &c.

*"Philadelphia, Dec. 20, 1818.**"Mr. James Bredin, (Carlisle,)*

"On the 17th of *February*, 1817, I had the pleasure to write to you concerning the amount you owe me, and at the same time informed you, that if you did not pay I would sell the goods you sent me, and credit you with the net proceeds of the sale. Since that time I have not heard from you, and must again advise you, how much soever it may be against my inclination, that if your account by the return of mail is not settled, I will send the goods to public auction to sell for whatever price they will bring, and pursue you to the utmost rigour of the law for the balance, which may remain due to me after the sale of these goods. I must also repeat, that it is not, nor ever has been, my practice to take goods back when once out of the store, and much less goods that never were in my store.

"The box is in the same condition as when you sent it to me, and remains subject to your order so soon as you have paid me, (that is, paid by return of mail; if not, they will be sold at public auction.) This, you may rest assured, is my last warning, and I have only put it off thus long, to show you that law is always my last resource."

Mahany, for the plaintiff in error. If the plaintiff did not mean to abide by the act of his agent in taking back the goods, he should have declared his intention immediately; whereas he waited for three months, and thereby affirmed the act of his agent. The principal must express his dissatisfaction with the acts of his agent in a reasonable time, or they will be affirmed. 12 *Johns.* 300. 1 *Johns. Ch.* 110. 1 *Vez.* 509. *Liv. on Ag.* 48. But even if the returned goods were to be considered as the property of the defendant, the plaintiff had no right to sell them at public auction, without giving notice to the defendant of the time and place of sale.

Meredith, contra. As to the sale by auction, the defendant acquiesced in it by returning no answer to the plaintiff's two letters, in which he was informed that there would be such a sale, and that

(Bredin v. Dubarry.)

he would be credited with the proceeds. But suppose the plaintiff had no right to sell the goods, there was no evidence that they were sold under their value. As to the acquiescence of the plaintiff for three months, that is no great length of time. There was no evidence at what time he received information of the act of his agent.

The opinion of the court was delivered by

GIBSON, J. This case presents for consideration, the construction of the agreement entered into by the clerk of the plaintiff below; and also whether under circumstances which happened subsequently, it became obligatory on the parties. As to the first, the particular form of the receipt, as it now stands, with the words "in full" scored out, is such as to involve the actual meaning of the parties in obscurity. For what reason the objection to these words was made, it is difficult to conjecture; but as the goods had been purchased from the plaintiff, and were to be returned to him, it is fair, in the absence of evidence to the contrary, to presume that they were to be returned at the original prices: otherwise the transaction would not have been a return of the goods, but a re-sale. If a re-sale had been intended, the prices would have been fixed in the agreement; or if the object had been a consignment to the plaintiff, to have the goods sold at auction, and the defendant's account credited with the proceeds, it is reasonable to presume that it would have been so expressed. The agreement then was, that the goods should be returned, and the original contract of sale *pro tanto* rescinded.

There was no evidence that the authority of the clerk extended to transactions of this sort, but he undoubtedly was an authorized agent for some purposes; and I take it to be indisputable, that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own. He is bound to disavow it the first moment the fact comes to his knowledge. Now, the arrangement in question was made on the 20th of *August*, 1816, and the first intimation which the defendant seems to have had of the plaintiff's intention to disaffirm it, is found in the plaintiff's letter of the 22d of *November* following, at the expiration of nearly three months. When the goods were received by the plaintiff does not appear; but it is a reasonable presumption of fact, in the absence of proof by the plaintiff to the contrary, that the clerk kept him regularly informed of all his transactions. At the period of the plaintiff's first letter, therefore, it was too late to object. The plaintiff had made the goods his own; and what followed could not change a state of things which had been consummated by the acquiescence of all parties. A merchant is entitled to an answer to every *bona fide* proposition made to his correspondent in the usual course of their dealings; but the plaintiff had no right to treat the goods as the property of the defendant, and the latter was therefore not bound to reply to

(Bredin v. Dubarry.)

any demand in respect of them. The court then undoubtedly erred in directing the jury, that on the facts in evidence the plaintiff had a right to sell the goods at auction as the property of the defendant, and recover the difference. The material inquiry for the jury was, whether the act of the clerk had been disavowed as soon as the plaintiff was apprized of it: if not, it became conclusive. On this ground, the cause must go to another jury.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY 9, 1826.]

In the Case of a Road in Abington Township, Montgomery County,
commonly called Second street Road.

58 O.S. 66.

CERTIORARI.

Re-reviewers are not restricted to a simple approbation or rejection of a road as originally reported, but may return a different one.

Re-reviewers are not bound to return a draft of the road which they are directed to re-review, but may return only a draft of that which they themselves recommend.

Certiorari to the Court of Quarter Sessions of *Montgomery* county.

Kittera, against the road, *Duane*, in support of the road.

PER CURIAM. There have been no less than four views on this road, and the reports of the viewers have been sometimes for and sometimes against it. The last report of the re-reviewers, laying out the road, was confirmed by the Court of Quarter Sessions. The proceedings have been brought before us by *certiorari*, and two exceptions have been taken to them.

1. That the re-reviewers have not reported in favour of the road as originally laid out, but after pursuing it for a considerable distance, stopt three hundred and twenty-five perches short of its termination.

When either party is discontented with the report of the first viewers, under the act of 6th April, 1802, (3 Sm. L. 512,) the construction put upon the 22d sect. of the act has been, that a review is a matter of right, at the expense of the party applying for it. The reviewers are not restricted to the approbation, or rejection of the road which they review, but may report a different one. This is not disputed.—But it has been contended, that when re-reviewers are appointed, they have no right to report a different road. We see no reason for this restriction, nor any law imposing it. Indeed it would be very inconvenient; because although the re-reviewers should be satisfied, that an advantageous alteration might be made, yet the parties would be driven to the

(Case of a Road in Abington Township.)

necessity of commencing their proceedings *de novo*, and all the expenses incurred in viewing, surveying and making drafts of the work, would be thrown away. We are therefore of opinion that the re-reviewers were not restricted to a simple approbation or rejection of the road which had been reported before, but might return a different one.

2. The second exception is, that the re-reviewers did not return a draft of the road which they were directed to re-review, but only a draft of that which they themselves recommended. There is nothing in this exception. All prior drafts were in possession of the court and it would have been a useless expence to return duplicates. It is the opinion of the court that the proceedings should be confirmed.

Proceedings confirmed.

[PHILADELPHIA, JANUARY 2, 1826.]

HINCHMAN *against* LYBRAND.

IN ERROR.

A person, who on furnishing bricks for the erection of a building, agrees to be paid part in cash, and "the balance in lumber at fair prices, whenever called for out of S's lumber yard," and accepts the guarantee of S. for the performance of the contract, does not lose his lien upon the building, given by the act of the 17th, March, 1806.

THIS cause was decided in the District Court for the city and county of *Philadelphia*, and was brought before this court by writ of error, on a case stated, in the nature of a special verdict. *Adam Hinchman*, the plaintiff below, being by trade a brick-maker, furnished bricks for two houses to be built by the defendant, *George C. Lybrand*. The contract was in writing, by which the defendant agreed to purchase the bricks of the plaintiff, at the rate of eight dollars and fifty cents per thousand—"three hundred dollars to be paid *in cash*, when the buildings were topped out, and the balance *lumber at fair prices*, whenever called for, from Mr. *Smith's* board-yard." The performance of this agreement on the part of the defendant was guaranteed by *Nathan Smith*, in writing. *Smith*, who was the owner of one of the houses, paid the sum of three hundred dollars according to the contract, and also paid in lumber, to the amount of four hundred and twenty-nine dollars, twenty-six cents, which sums were applied to the payment for the bricks furnished for the house owned by *Smith*, and the plaintiff released his lien on that house, and filed his claim for the balance of his account, within the time limited by law,

(Hinchman v. Lybrand.)

against the other house. *Smith* became insolvent before the plaintiff demanded lumber for the balance of his account.

Newcomb, for the plaintiff in error, contended that the court below erred in deciding that there was no lien under the act of the 17th of *March*, 1806, *Purd. Dig.* 416, on the ground of a special agreement for payment of the bricks furnished. The plaintiff did not intend to give up his lien, though he agreed that part should be paid in lumber. Neither the letter nor spirit of the act excludes a party from enjoying his lien under such circumstances.

McIlvaine, contra, contended that there was here an agreement of a very special nature: three hundred dollars cash to be paid by *N. Smith*, and the balance in lumber when called for. The lumber was to be paid by *Smith*, and the agreement was guaranteed by him. Taking such a guarantee is a relinquishment of the lien. *Kauffelt v. Bower*, 7 *Serg. & Rawle*, 84. *Gilman v. Brown*, 4 *Wheat.* 256. 1 *Johns. Ch.* 308. 5 *Munf.* 297. 2 *Wash.* 141. In *Cobb v. Traquair*, *March*, 1819, the District Court held, that a contract to pay in stone work was not within the lien act.

The opinion of the court was delivered by

TILGHMAN, C. J. It is contended on the part of the defendant, that under the circumstances in the case stated, the lien of the plaintiff is extinguished. If it is so, it an extinguishment by implication, for it is not pretended that there was any express waiver or release of the lien. There is no inconsistency in the plaintiff's accepting the guarantee of *Smith*, and retaining his lien. If *Smith* satisfied the whole demand of the plaintiff, there would be an end of the lien; but, if he did not, the lien ought to be resorted to. Indeed, it was for the interest of *Smith*, that the lien should remain in force, because the plaintiff might have had recourse to it in the first instance, and perhaps the knowledge of this might have been an inducement to *Smith* to enter into the guarantee. It is very common to have two securities for the same debt; a mortgage, for instance, and a bond; and the creditor may take his remedy on both, until he obtains satisfaction. So, if the owner of a rent charge in fee, with a right of re-entry, in case the rent be in arrear, takes a bond for the arrearages, his right of re-entry remains unimpaired. The counsel for the defendant relied on the case of *Kauffelt v. Bower*, 7 *Serg. & Rawle*, 84, in which it was decided by this court, that if the vendor of land takes a bond for the purchase money, the land is discharged. But that case is very different from the present, because any lien which the vendor may have is altogether of an equitable nature, and will not be enforced where, from the circumstances of the case, there is probable ground for supposing, that it was not the intent of the parties that the purchase money should be a charge on the land. But here the lien is strictly legal, and expressly given by the act of assembly, (*March* 17, 1806, 4 *Sm. L.* 300,) so that we ought not to consider

(Hinchman v. Lybrand.)

any act except a plain one, as a waiver or release. The plaintiff asks no more than payment of a debt which is not disputed. When he accepted the guarantee of *Smith*, he did not say that he relinquished his lien, and I am of opinion that the law did not extinguish it by implication. But the defendant has another ground of defence, viz. that this case is not within the act of assembly, because payment for the bricks was to be made, part in money and part in *lumber*. I do not see why this circumstance should deprive the plaintiff of the benefit of the act. The amount of his claim was ascertained, and whether to be paid in money or money's worth was immaterial. If the lumber had been refused, on demand made, and the plaintiff had brought an action for damages, the jury would have been bound to give damages to the amount of his account. That was the standard from which they could not justly depart; so that when the plaintiff filed his claim, as required by the act of assembly, its amount, *in money*, was certain. Let us consider the expressions of this act, and see whether there be any thing which should exclude a debt of this kind. "Every dwelling-house or other building hereafter constructed and erected within the city and county of *Philadelphia*, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brick-maker, bricklayer," &c. Now, here was a *debt* contracted for bricks provided by a brick-maker for the building of this house. The case falls within the very words of the act; and surely it is not out of its spirit. If the plaintiff's claim had been for unliquidated damages of an uncertain nature, there might have been difficulty, because of its uncertainty. But in this case there was no uncertainty, because the amount of the account was the standard of damages. In an action of *assumpsit* for goods sold and delivered, the plaintiff demands *damages*, which are to be assessed by the jury. Yet we call it a *debt*; and if the plaintiff proves the contract, no jury would depart from the price which the defendant had agreed to pay, unless there was something unfair in the transaction. So, a rent reserved payable in wheat may be distrained for; or an action may be brought for it, in which the plaintiff will recover the value of the wheat at the time it ought to have been delivered. In the case before us, the plaintiff was to receive payment of his account *in lumber at a fair price*; so that if the lumber was not delivered, *the amount of the account, in money*, would be recoverable. It appears to me, therefore, that the plaintiff's claim was a *debt* within the meaning of the act of assembly, for which he had a lien on the house of the defendant.

I am of opinion that the judgment of the District Court should be reversed, and judgment entered for the plaintiff in error.

Judgment reversed, and judgment entered for plaintiff.

[PHILADELPHIA, JANUARY 17, 1826.]

SHEEPSHANKS and others *against* COHEN and another.

IN ERROR.

Assignment by *B. B.* of all the effects of the late firm of *Y. and B.*, *B. B.* and Co., and of *B. B.*, in trust to pay such creditors of the late firm of *Y. and B.*, and of *B. B.* and Co., as shall release all claims against the said late firm of *Y. and B.* and against the said *B. B.* and Co. within a certain time. Plaintiff, a creditor of *B. B.* and Co., executed a release within the time prescribed of all claims against the firm of *B. B.* and Co. *Held*, not to be conformable to the provisions of the assignment.

WRIT of error to the District Court for the city and county of *Philadelphia*. The plaintiffs in error were defendants below.

Cohen and *Nesbit*, the plaintiffs below, brought a suit against the defendants below, as assignees of the late firm of *Benjamin Bates* and Co., to recover such dividend as may have been due upon the sum of seven hundred and two dollars and forty-three cents, with interest, alleged to be due from *B. Bates* and Co, under the following circumstances:

B. Bates, of the firm of *B. Bates* and Co., and *John Davis*, of the firm of *Anderson* and *Davis*, came to the store of the plaintiffs below, on the 24th of *October*, 1818, and examined a parcel of vestings. A bale was bought of the plaintiffs below, to the amount of seven hundred and two dollars and forty-three cents. The goods, &c. bought were charged to the account of *Anderson* and *Davis* and *B. Bates* and Co. on the plaintiffs' books at six months' credit, in the handwriting of the said *Nesbit*, who was not present at the sale. But it was denied by the defendants that the goods were sold to *Anderson* and *Davis* and *B. Bates* and Co. by the plaintiffs. They alleged the sale to have been only to *Anderson* and *Davis*, while the plaintiffs alleged that they were sold to both. The plaintiffs gave evidence that *Davis* and *Bates* went to the store to look at the vestings; that if they suited, *Bates* was to take a part, and that after examination they agreed to take a package. Mr. *Cohen* asked where the goods should be sent to, and *Davis* answered, "You may as well send them to *Anderson* and *Davis's* store." They were sent there, with a bill made out, accordingly.

The defendants gave evidence, that *Bates* said nothing to the plaintiffs about buying; that he had nothing to do with the purchase of the goods; that *Davis* said to *Cohen*, "I will take this," and that *Cohen* asked who the goods were to be charged to, when *Davis* said, "to me;" that the plaintiffs received through a Mr. *Fotteral* the note of *Anderson* and *Davis* for seven hundred and two dollars and forty-three cents, for the goods sold, which at maturity, the 27th of *April*, 1819, was protested for non-payment, and notice given thereof to *Bates*; that *Bates* and Co. bought part of the

(*Sheepshanks and others v. Cohen and another.*)

vestings from *Anderson* and *Davis*, and gave their note for three hundred and forty-one dollars and five cents therefor, which was passed away by *Anderson* and *Davis*, and paid at maturity by *Benjamin Bates* and Co. or their indorsees. The note of *Anderson* and *Davis* was received and held by the plaintiffs until due, and passed to the credit of the goods on the books of the plaintiffs. The assignment of *B. Bates*, under which the plaintiffs claimed, provided for the payment of certain debts, viz. those due from the firm of *B. Bates* and Co. from *Young* and *Bates*, and it provided for a release from all claims, &c. A release was tendered in due time.

The court charged the jury (among other things) as follows: "If *Bates* and *Davis* came together to buy, examined together, and they or *Bates* disputed the price, and the answer was, the plaintiffs might as well send the goods to *Anderson* and *Davis*, then the defendants may be considered as joint purchasers. If there is sufficient evidence to imply an agreement by *Bates* to be jointly liable, that is sufficient. The legal objections are not well founded. It is a just charge on the funds within the terms of the assignment, and the release is sufficient."

The assignment of *Benjamin Bates*, for himself and *Benjamin Bates* and Co., was made to *Francis Milligan*, *William Sheepshanks*, and *John Phillips*, and dated May 14th, 1819, of "all effects belonging to the late firm of *Young* and *Bates*, or to *Benjamin Bates* and Co., or to the said *Benjamin Bates* in his individual capacity, in trust to pay over the moneys so obtained in equal, just, and rateable proportions, to the payment and satisfaction of such of the creditors of the said late firm of *Young* and *Bates*, and of the firm of *Benjamin Bates* and Co. as shall within thirty days from the date of this indenture execute and deliver to the said trustees, or either of them, a good and sufficient release and discharge of all their claims and demands against the said late firm of *Young* and *Bates* and against the said *Benjamin Bates* and Co."

The assignment was accepted by the defendants on the 14th of May, 1819, acknowledged on the same day, and recorded on the 14th of June, 1819.

The release was as follows:

"To all to whom these presents shall come,—we whose hands and seals are hereunto annexed, creditors of *Anderson* and *Davis* and *Bates* and Co., send greeting. Whereas the late firm of *Benjamin Bates* and Co., together with *Anderson* and *Davis*, are indebted to us in sums of money, which they are not fully able to satisfy: And whereas *Benjamin Bates* did, by a deed of assignment, dated May 14, 1819, convey and assign to *Francis Milligan*, *William Sheepshanks*, and *John Phillips*, all his estate in trust for the creditors therein mentioned, on certain conditions, as appears by the assignment: And whereas we are desirous of availing ourselves of the provisions in the said assignment, and have agreed

(Sheepshanks and others v. Cohen another.)

to make and execute a release pursuant to the said deed: Now know ye, that as well for the considerations aforesaid, as of the sum of one dollar to us in hand paid by the said *Benjamin Bates*, at the time of the execution hereof, the receipt whereof is hereby acknowledged, we have and do by these presents, remise, release, and for ever discharge the said firm of *Benjamin Bates and Co.*, their or his heirs, executors, administrators, or assigns, of and from all debts, dues, claims, and demands whatsoever, in law or equity, which we now have against the said firm, reserving to ourselves any right against the firm of *Anderson and Davis*."

The plaintiffs in error assigned for error,

1. That the charge of the court was erroneous in this,—that it is not necessary to prove an express agreement to bind *Bates*, as an implied one is sufficient.

2. That the said charge is erroneous in this,—that if *Bates and Davis* came together to buy, examined together, and they or *Bates* disputed the price, and the answer was, the plaintiffs might as well send the goods to *Anderson and Davis*, then the defendants may be considered as joint purchasers.

3. That the said charge is erroneous in this,—that the bill (viz. of the goods sold by the plaintiffs,) sent to one was substantially sent to both.

4. That the said charge is erroneous in this,—the legal objections are not well founded: it is a just charge on the fund, within the terms of the assignment, and the release is sufficient.

Broom, for the plaintiffs in error.

Bradford and T. Sergeant, contra.

The opinion of the court was delivered by

DUNCAN, J. This was an action brought by *Cohen and Nesbit* against the plaintiffs in error, the assignees of *Benjamin Bates and Co.*, to recover a dividend of the effects of *B. Bates and Co.*, under an assignment made by *B. Bates* to them of "all the effects of the late firm of *Young and Bates, Benjamin Bates and Co.* and *Benjamin Bates* in his individual right, in trust to apply the money obtained on the assignment to the payment and satisfaction of such of the creditors of the said late firm of *Young and Bates and Benjamin Bates and Co.* as should within thirty days execute and deliver to the trustees, a good and sufficient release and discharge of all their claims and demands against the said late firm of *Young and Bates and Benjamin Bates and Co.*" *Cohen and Nesbit* did, within the thirty days, execute a release of all their claims and demands against *Benjamin Bates and Co.*

On the trial in the District Court two questions arose, one of fact, which was, whether *Benjamin Bates and Co.* were the debtors of *Cohen and Nesbit*, or were only sub-purchasers from *Anderson and Davis*, of a quantity of vestings sold by *Cohen and Nesbit*.

There was some contradiction in the evidence, but certainly

(Sheepshanks and others v. Cohen and another.)

enough to have left it to the jury to conclude that the goods were sold on a joint contract to *Anderson* and *Davis* and *Bates* and Co. They were together when the goods were contracted for, they examined them together, they were charged as joint purchasers, and a joint bill was made out, which was sent with the goods to *Anderson* and *Davis*. This certainly was pretty strong evidence of a joint sale, and would require strong testimony to repel it. Whether such evidence was given was a fact for the jury, and, as a fact, it was left to them, in some measure depending on the credit to be given to the witnesses. The concurrent circumstances of a joint sale, viz. the entry in the books of *Cohen* and *Nesbit* and the joint bill, cannot fail to make this impression.

I do not think the charge is exposed to the exception taken to it, that the case was put to the jury that there was ground for an implied promise, or to raise a promise by construction of law. When the court speak of an implication, it is not to be considered that they intended the action on an implied promise arising by operation of law, but an inference to be drawn from the circumstances of an express joint contract. Express contracts are, where the terms of the agreement are fixed by the contracting parties. They arise from the agreement of the parties, but it is not necessary to prove the agreement by any precise form of words. Whatever will satisfy the jury of the assent of two minds to do, or not to do a particular thing, is satisfactory proof of any express agreement. Any thing which shows the assent of the parties is sufficient. Implied promises are such as reason and justice dictate, and which therefore the law presumes every man undertakes to perform; as, where a man orders goods of a tradesman, without any agreement as to price, the law concludes that the bargainer contracted to pay the seller the real value. It is difficult to state with certainty when contracts and promises are exclusively implied, though, as a general rule, it may be observed, that promises in law only exist where there is no express stipulation between the parties. *Toussaint v. Martinnant*, 2 T. R. 105. There was no question here but there was an express stipulation by somebody to pay for these goods, and the question of fact was, whether it was a stipulation by *Anderson* and *Davis* and *Bates* and Co., and so it appears to me it was properly left to the jury. There is no error, therefore, in this part of the charge.

But there was a question of law, whether the plaintiffs had entitled themselves to come in upon this fund, by executing a proper release, and, in the opinion on that question, I think the court fell into error. *Nesbit* and *Cohen* had their election to come in and partake of the benefit of this assignment, or to decline it, and sue for the debt. But, if they did come in, it must be on the prescribed condition. The performance of this was a condition precedent. It is not for the court to say, there was any thing unmeaning in the requisites, or that they meant otherwise than

(Sheepshanks and others v. Cohen and another.)

they express. The court would willingly act on the construction contended for by the defendants in error, if the effects of the late firm of *Young and Bates* and *Bates and Co.* had been kept separate, and were distributed in that order, and so would have construed the words, *reddendo singula singulis*. But it has pleased the author of the fund out of which payment is demanded, to throw the effects of *Young and Bates* and *Bates and Co.* into one common stock, and to direct the estates of both, without any relation to the amount due by each, to be paid out of that common stock, in proportion to the amount of the debts against both. What were the reasons of *Benjamin Bates* for this we cannot know; but he has thought proper so to modify the whole of his co-partnership concerns as to consolidate the debts and effects. Those creditors of the different firms who have acceded to this consolidation are bound by it. Now, by the structure of this assignment, whoever came in, and on whatever account they came in, were previously to relinquish all their claims and demands against all the firms. Where effects are consolidated, the release should then be commensurate, and go to the discharge of all those parties whose funds were thus consolidated.

Now, if *Cohen* and *Nesbit* recover in this action against *Bates and Co.*, it is out of the joint funds of *Young and Bates* and *Bates and Co.* The effects of *Young and Bates* would, for aught that appears, then, be appropriated to the payment of *Bates and Co.*'s debts, and *Young and Bates* still remained liable personally to any other claim of *Cohen* and *Nesbit*. It is said, in answer to all this, *non constat* they have any other: to which it is very properly replied, *non constat* but they have. We know not, nor can we know, whether they have or have not. The creator of this fund has chosen to make the full release of all debts for which he was bound, under the name of every firm in which he had embarked, a condition precedent, the performance of which was necessary, before any creditors of any firm should come in, for any dividend of the united funds of all the firms. The plaintiffs below have not done so, and can claim nothing from the fund in the hands of the defendants; the plaintiffs in error; and the judgment is for this reason reversed.

I would further observe, that if the plaintiffs in error were liable, it must be as trustees and assignees, not of *Bates and Co.* alone, but of *Young and Bates* and *Bates and Co.*

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY, 17, 1826.]

WAY and another, Administrators of WAY, *against* GEST and Wife.

CASE STATED.

Devise to three daughters during their lives, respectively, by metes and bounds. "Item, it is my will that if any of my daughters die without lawful issue, or if having issue, and such issue all die in their minority, without leaving lawful issue, then I give the land and premises so to them before allotted to my other child or children's lawful issue, as tenants in common, to hold to them, their heirs or assigns for ever." One daughter died before the testator: the others survived, and one of them married and had two children, and then with her husband conveyed an interest in the share of the deceased daughter, claiming to hold by the father's intestacy as to it: *Held*, that it passed no title.

THIS case was tried before GIBSON, J. at *Nisi Prius*, in December last, and a verdict found for the plaintiff, subject to the opinion of the court. The following case was afterwards stated.

"On the 5th of April, 1799, Jeremiah Barnard made his will, whereby he devised certain portions of his real estate to each of his daughters, Judith, Mary, and Ann, during their lives, respectively, by metes and bounds. He then introduces the following clause: 'Item, it is my will that if any of my daughters die without lawful issue, or if having issue, and such issue all die in their minority without leaving lawful issue, then I give the land and premises so to them before allotted to my other child or children's lawful issue, as tenants in common, to hold to them, their heirs or assigns, for ever.'". On the 24th of August, 1799, Judith, the youngest daughter, died. On the 26th of August, 1799, the testator executed a codicil, not altering the will in any essential particular. On the 28th of August, 1799, Jeremiah Barnard, the testator, died. At the time of his death, his two daughters, Ann and Mary, were under age. Mary afterwards intermarried with Joseph Way on the — of October, 1812, and had two children, Mary Ann Way born in 1813, and Joseph Morris Way born in August, 1815. On the 22d of June, 1818, Joseph Way and Mary his wife, executed a conveyance to Ann Barnard, of all the said Mary's interest, in the land devised by Jeremiah Barnard to his daughter Judith. This conveyance recites the devise in the said will to Judith, and also the devise over above quoted, and then proceeds to state that 'whereas, the said Judith, deceased, unmarried before the decease of her father, the said Jeremiah Barnard, who, at the time of his death, in consequence of the previous decease of the said Judith, died intestate as to the aforesaid tract or parcel of land, with the appurtenances, leaving issue two daughters, to wit: Ann, and Mary the wife of Joseph Way, to whom by the laws of this commonwealth, relating to intestate's estates, the aforesaid tract or parcel of land did descend and come.' On the 26th of June, 1818, Ann Barnard

(Way and another, Administrators of Way, v. Gest and Wife.)

the said conveyance, her bond, in the penal sum of two thousand, six hundred and eighty dollars, conditioned for the payment of one thousand, three hundred and forty dollars, on or before the 1st day of *April* ensuing the date, with interest from the 1st day of *April* previous to the date. Of this bond six hundred dollars on account of the principal, and the interest up to that time, were paid on the 6th of *March*, 1819. On the 15th of *December*, 1819, *Ann Barnard* intermarried with *John Gest*, and has had three children, viz. *Mary Ann*, *Joseph*, and *Jeremiah Barnard*, the last of whom has died. *Joseph Way* is deceased, and the plaintiffs are his administrators.

The defendants allege that they are not liable for the balance of the bond, as the consideration for which it was given, failed, *Mary Way* not having (as they allege) any interest in the estate devised to *Judith*, by *Jeremiah Barnard*: and of this equitable defence, notice was given on the 18th of *June*, 1824.

Binney, for the plaintiffs.

J. R. Ingersoll, for the defendants.

The opinion of the court was delivered by

GIBSON, J. As the counsel agree that judgment must be entered for the defendants, I shall confine myself to a statement of the principles that result from the authorities which they have adduced. But it is first necessary to know what estate *Judith* would have taken had she survived the devisor. The devise is to her expressly for life, "and then after her decease to her lawful issue, provided she hath issue, who are, or shall live to be, twenty-one years old, or to have lawful issue, to hold to them, their heirs or assigns for ever." In the first place then, the word *issue*, even without superadded words of limitation, is often a word of purchase where the word *heirs*, or even the word *heir* in the singular number is not. But here there are engrafted on the limitation to *Judith's* issue, words of limitation to them in fee, on their living to the age of twenty-one or having issue. It is indisputable then, that the devise to *Judith* was of an estate for life, with a contingent remainder to her issue in fee. But on the death of any of the testator's daughters without issue, or having issue who should die in their minority without leaving lawful issue, there was a further limitation over to his other child or children in fee as tenants in common. It will therefore be perceived, that here was a contingency, with a double aspect, to wit: *Judith's* leaving or not leaving issue, who should live to twenty-one, or dying in their minority, leave lawful issue; on which depended concurrent remainders to two sets of devisees, either of which was to take in exclusion of the other, as the event should happen. In other words, the limitation over was to the issue of *Judith*, if she should leave any who should answer the description in the will; and if not, then to the issue of her sisters. The limitation to the issue of her sisters, therefore, was also a contingent remainder.

(Way and another, Administrators of Way, *v.* Gest and Wife.)

But although it be a general rule that a contingent limitation, preceded by a freehold capable of supporting it, shall be construed to be a contingent remainder, and not an executory devise, it is not without an exception; for if the particular estate be prevented from taking effect in the lifetime of the first devisee, and before the contingency has happened, it will be considered as if it had been limited without any preceding freehold, and consequently will enure by way of executory devise. But where the particular estate has become vested, there is no exception to the rule as above stated. Of this the case of *Brownsword v. Edwards*, cited during the argument, is a striking example. The devise was to trustees to receive the rents and profits till *Brownsword* should attain the age of twenty-one; and if *Brownsword* should attain the age of twenty-one, or have issue then to *Brownsword* and the heirs of his body; but if *Brownsword* should happen to die before twenty-one, and without issue, then remainder over. *Brownsword* attained the age of twenty-one and died without issue: And Lord HARDEWICKE, considering the word *and* as used for *or*, and the condition as disjunctive, held that the limitation over would have enured by way of executory devise if *Brownsword* had died without issue, and under twenty-one; but having died without issue after twenty-one, when the estate had vested in him, the limitation over, could take effect only as a remainder. It is plain, therefore, that the construction may in this particular be determined by extrinsic circumstances. But even had the life estate of *Judith* vested in interest, it is impossible that both the remainders limited on it, should have failed to take effect on the contingency of her dying without issue; and the fee would therefore have been well limited over as a contingent remainder. The conveyance then by *Mary*, one of the daughters of the deviser, and her husband, to her sister *Ann*, of the premises devised to *Judith*, passed no title to her; and this bond which was given for the purchase money, was consequently without consideration, and no action can be maintained on it.

Judgment for the defendants.

[PHILADELPHIA, JANUARY 17, 1826.]

ROBERJOT *against* MAZURIE.

The construction of a will, obscurely and incoherently worded.

CASE STATED.

This action, brought by *John H. Roberjot* against *Caroline Mazurie*, was entered amicably, and the following case submitted for the opinion of the court.

(Roberjot v. Mazurie.)

James J. Mazurie departed this life in the year 1822, having previously made his last will and testament, dated *February 20th, 1822*, wherein and whereby he devised to his wife *Caroline Mazurie*, prout the will, and having also made a codicil to the said will, bearing date the *9th March, 1822*. The whole of the said will and codicil are in the hand writing of the testator. The said *James J. Mazurie* had previously executed a last will and testament dated the *8th of May, 1815*, which will was in the hand-writing of *Isaac Wampole*, of the city of *Philadelphia*, scrivener; and also a codicil in his own hand-writing, dated *January 1, 1817*. The said last mentioned will and codicil were afterwards revoked or supplied. They were not in force at the testator's death.

The question was, what estate and interest *Caroline Mazurie*, the testator's widow took under the will and codicil of 1822.

The will and codicil were as follows:

"Whereas it becomes the duty of a prudent man to arrange and settle his worldly affairs in due time, and more particularly when free of any distemper and sickness which might influence his ideas, I therefore take advantage of my present state of health, which leaves me unimpaired all the faculties of my mind and body, to declare that the following dispositions are those that I wish may have their full effect and execution, after my death.

"First, I give and bequeath to my beloved wife, *Caroline Burn Parmentier*, all my plate, jewelry or jewels, household and kitchen furniture of every description, and all and every article of provisions, liquors, merchandise and money which may be in my house at the time of my decease, without any inventory or account to be taken or made thereof.—Also, two third part of all other of my real and personal estate, to hold for her absolutely and for ever: moreover, I give and devise to my said wife, the two-third part of the nett rents, issues and incomes of all my real estate, for and during all the term of her natural life, and all the rest, residue, reversion, and remainder of my estate, real and personal, whatever or whatsoever, and wheresoever, I give, devise and bequeath, that is the other third, unto my beloved son *James Victor Mazurie*, to hold to him, his executors, administrators and assigns, forever, and at the death of his mother, to become, or he becomes sole heir of all I have bequeathed to her.

"Item, I nominate and appoint my said wife *Caroline*, and my friend *J. H. Roberjot*, (Mr. *Stephen Girard's* clerk,) executors of this, my last will and testament, and also testamentary guardians of the person and estate of my said son, during his minority, and in case of his mother's death, her mother, Mrs. *Parmentier*, is to replace her with Mr *J. H. Roberjot*, and if either of them die, to be replaced by those in whom they will leave their own affairs and confidence, &c.—Provided always, and it is my mind and will, and I do hereby authorize and empower my said executors,

(Roberjot v. Mazurie.)

and the survivors and survivor of them, if in their judgment it would be advantageous to my said wife and son, to sell and dispose of all, or any part of my said real estate, and to convey the same to the purchaser or purchasers thereof, his, her or their heirs and assigns forever. I will observe that I have made two wills, both of the same tenor and date, (say duplicate) annulling and making void all former ones, wishing this to be taken as the only one that I acknowledge, and that it may have as much force and effect as if it passed before notaries and witnesses.

“*Philadelphia, February* the 20th day, in the year of our Lord one thousand, eight hundred and twenty-two. *J. J. Mazurie.*”

“Christian name, *James John*,—who is born in *Landerneau, Lower Brittany, in France*, the eleventh day of *September*, seventeen hundred and sixty-four; and was baptized *Jacques Jean Patient Mazurie*; but has always signed as above.

“A supplemental act of *James John Mazurie*. Having reflected, and apprehending to leave any trouble to my beloved wife after my death, I wish to alter a part of my will, and I do alter it, which is only with regard to my son *James Victor*, and which I think will turn to his advantage hereafter, that is, that my wish is to annul, and do annul it, the word, during his minority, and to insert in his stead, the words when he attains his thirtieth year, and not before, at which time a transfer will be made to him, that is, in his name, but in trust for the benefit of his children or children’s of his third, according to my will here above; and till he attains his thirtieth year he will be maintained by his mother, who will be at liberty to allow him the nett or clear third of his incomes, if she think it proper; if not, only whatever she wishes, according to his behaviour, and then he will have no right to bring her to an account for what she may have paid, disbursed or advanced him to the term of his thirtieth year; at which time there will be an evaluation made of all the property, (household furniture, &c., herein before-mentioned excepted) which I have bequeath to her during her life, and afterward to our said son for the benefit of his children, and after the evaluation is made, my wife will have the privilege of holding at the evaluation prices, whatever property she thinks proper for her two-third, after which the transfer of the other third of my estate will be made over to him for the benefit of his children, if any he has lawfully; to be divided among them equally, after his death and they of age, and if he leave no heir or heiress, and should die before his mother, it goes to her, and after her death, the whole of my estate shall go to my real heirs, that is, in case that our beloved son *James Victor* do not get married, and has no children, but if he has any, my wife’s two-third after her death, will be transferred over to him for the benefit of his children as before-mentioned, and not otherwise; but that he will receive and enjoy with his children, the interest or incomes of said estate during his life, and if he has no children, after he attains his

(Roberjot v. Mazurie.)

thirtieth year of age, he is only to enjoy of the interest or income of my estate during his life, and not to dispose of the capital, I mean of any part of my real or personal estate, as it is to go to my real heirs after my wife's death, and his death if he has no children; and if it should be that any part of my stocks or real property should be realized in cash, in such case the administrators will do their best to invest the said money in some other stocks or real estate, and likewise the cash, if any I leave in banks, or any money received of my outstanding debts, I say to have the whole invested as before-mentioned, in stocks or real property.

"As it will be understood by this writing, that all my outstanding debts are included, I will make an exception, and mention that I do not include altogether, the bond of Messrs. *Anthony Beelen* and *C. H. Bosler*, of *Pittsburgh*, dated *August 8, 1821*, for forty five thousand dollars, payable in fifteen instalments of three thousand dollars, each yearly with interest, my wish being, that at the recovery of that sacred debt, one eighth part of whatever will be recovered of that said bond, will be put in some kind of good stock or real property, the interest of which will be divided equally among my brother *Theodore*, his children now in *Pittsburgh*, and one sixteenth part of the same said bond of *Beelin & Bosler*, to my brother *William*, now at *Athens*, state of *New York*, which is likewise to be invested in good stock or real estate, the interest or incomes of which he will enjoy, during his life, and after his death if he has no children, to go to my brother *Theodore*, his children, and the remainder of said bond, as before mentioned, that is, two-third to my wife, and one third to my son *James Victor*.

"This supplemental act of my last will and testament to have the same force and effect, as if passed before notaries and witnesses.

"*Philadelphia*, the 9th day of *March*, in the year of our Lord 1822. *J. J. Mazurie.*"

The case was argued by *Binney*, for the plaintiff, and *Phillips* and *J. R. Ingersoll*, for the defendant.

The opinion of the court was delivered by

DUNCAN, J. This is an inquiry on a will where the intention of the testator is obscured by an overstretched anxiety to be plain, and the use of a redundancy of words to express that of which the testator in his own mind had formed a distinct and clear idea. In forming a judgment of this intention, the understanding is not tied to the technical sense of any form of words. No other man's will can guide us in the construction of this man's will; for no other man's will is worded as this is. Every case of the kind is governed by its own circumstances, and is individual; and we are sensible of the kindness of counsel in relieving us from the fatigue of hearing numerous cases on the ill-expressed wills of other men.

The will and codicil have been properly considered as but one

(Roberjot v. Mazurie.)

testamentary disposition. The declaration of the testator, as to the way in which he wished his property to go on his death, and the aid of a former will have been enlisted by both parties, to assist in their opposite constructions. I know of but one rule, and that is the dictate of common sense, to take an expansive view of every part of the will, the testator's estate, and his family, and from that endeavour to come at his general plan; for almost every testator has formed to his own conception some general plan, and, however ambiguous his verbiage may be, and however inconsistent particular expressions may be, (which ought not to be caught at to defeat his general intention,) by transposing clauses in the will, giving full effects to his hints, circumstances will break out to ascertain the leading intention, and render that plan clear on meditation; which on a first and even a second perusal might appear doubtful. Such was the state of my mind when I first read this will and codicil; but, on a more mature examination, considering it provision by provision, step by step, and word by word, all doubt has vanished, and the scope of the testator's view, both as to the first disposition and the last destination of his estate, both real and personal, appears to my vision as clear as that of any other will I have had occasion to consider. A will is never to be construed by adverting to a single clause. Every thing bearing on that subject must be taken together; every word is to have effect, and have a meaning imputed to it, if capable of it, without violating the general intent; and if any general intent can be collected, or any one particular object, expressions militating with that may be rejected.

The testator was possessed of a considerable real, but much larger personal estate; he had a wife about thirty-two, an only child, a son, of about twelve, when he made this will and codicil. Seven years before that, when he made his first will, these were the only objects of his bounty; he did not then contemplate provision for any other human being. That will was drawn by a gentleman who has expressed the intention of the testator, in a manner not to be misunderstood. By that will his wife had first a specific bequest of plate, household furniture, and other enumerated articles of considerable value, without any inventory or account to be taken of the items of his personal estate, to her absolutely and for ever. Moreover, he devised to her the one-third part of the nett rents, issues, and income, of all his real estate during all the time of her natural life: the rest, residue, and remainder of his estate, real and personal, he bequeathed to his son, *James V. Mazurie*, to hold to him, his heirs, executors, administrators, and assigns for ever. He made his executors testamentary guardians of his son, and appointed his wife, *Roberjot*, the plaintiff, and *Joseph Donath*, his executors. On the 25th of *February*, 1822, he revoked this will, and drew up another in his own handwriting. It is evident that he had before him the revoked will, for he copies, in some provisions, its very words; and indeed there is little differ-

(Roberjot v. Mazurie.)

ence between these instruments, except that he devises to his wife two-thirds instead of one, and instead of giving his wife the personal estate absolutely and for ever, he adds the word real. But there is added to these devises this most significant clause, *and at the death of his mother to become, or he becomes, sole heir of all I have bequeathed to his mother.* A few days afterwards, on the 9th of March, he adds the codicil with his own hand; and then, for the first time, an intent appears to preserve and continue his property in his own family; for although he sets out with the declaration of an intention to alter his will with regard to his son only, and for his advantage, yet, as to the son, on any construction, it is not very beneficial, but if the mother's construction prevails, it is as to him, far from being a very natural and kind disposition. He is to be a minor until thirty, dependent on his mother's bounty; and instead of an absolute estate, in one-third of both real and personal estate, with a remainder on his mother's death of the whole estate, he has only a life estate in one-third of both real and personal, and a remainder in the two-thirds of the real. But the testator did not so intend, for there is an entire new modification of his estate. He looked beyond this—the death of his wife, and the death of his son without children, and provides another succession, on the happening of these events, both as to the real and personal estate. On the mother's death, the two-thirds bequeathed to her are to go over to *James*, for the benefit of his children; and on *James's* death without children, in his mother's lifetime, to go over to her for her life; and on *James's* death without children, and on the mother's death, the whole of his estate, both real and personal, is to go over to his real heirs. These are more than translations; they are the plain words of the testator, written with his own hand. Throughout this whole codicil there is a constant endeavour on his part to be understood that his wife and his son were to have life estates, both in the real and personal property, and that on the death of the son without children, the mother was to take *the whole*, and on the death of the mother, the son, for the benefit of his children; and that when the mother is dead, and the son is dead without children, then the whole is to go over, the real estate in bulk, and the capital of the personal without diminution, to the real heirs of the testator. I care not whether he gave to any words either their appropriate legal meaning, or did not use them in that sense, when the inquiry is after intention and not on the effect of words of legal limitation. Here there was a singleness in the intent; provision for his wife during life, ample and liberal; for his son during life, and, if he left any children, they were to enjoy the whole, but if he died without children, then to his real heirs; for real heirs may be applied either to his heirs at law, or to his personal representatives, with respect to the different kinds of estate. What interest the son takes—what interest his children take—who are the real heirs intended by the testator to

(Roberjot v. Mazurie.)

take on the death of his son without children, are not subjects of inquiry at present. The inquiry is, what interest does the wife hold? The counsel of the defendant, while they contend for her absolute interest in the personal estate, consider that she only holds a life estate in the real. The construction which gives consistency to every part of the will, and effectuates both the general and particular intent, ought to prevail. The construction which separates the real from the personal estate, giving an estate for life in the one and demanding the absolute property in the other, would effectually defeat the manifest intention of the testator,—that, on the happening of particular events, the whole should go over to his real heirs. On the death of his mother, two-thirds will be transferred to him for the benefit of his children. He is only to enjoy with his children the interest or income of the said estate during his life, and not to dispose of the capital. “I mean,” says the testator, “of any part of my real and personal estate, as it is to go to my real heirs after my wife’s death, and his death, if he have no children.” In every line of this codicil, where he speaks of his estate, it is of his real and personal estate linked together, and when he speaks of his devisees, it is as devisees for life, and on the death of either, he makes a similar provision for the other, and on both their deaths, (his son’s dying without children,) all to go over to his own family. If the son took but an estate for life in the personal estate, the wife took but the same interest: the quantity of interest each took was the same, the proportions differing. The testator, providing for the valuation of his property, all his property, (except the specific legacy,) calls it a valuation of all he had given his wife for life. She is to have the privilege of holding at the valuation prices, whatever she thinks proper for her two-thirds, and the remaining third is to be transferred to his son. If it be so, as the defendant contends, then by choosing the real estate, she becomes the owner of that, in fee simple, as part of two-thirds at the valuation; for there is not to be a different valuation of the real and personal property; the one the valuation of a life interest, the other the absolute property. This would be an absurdity that could not be imputed to any man capable of devising. If this proves an absolute ownership in the personal, it proves an absolute fee in the real, which is not pretended. Further, he gives his executors, or the survivor of them, of whom his wife is one, power to sell the whole real estate, and the money arising from the sale, as well as the money in bank, and money to be received from his outstanding debts, to invest in some other stocks or real estate. How is this, when converted, to go? Is it to preserve its pristine quality, and to go as if it never had been changed? There is no provision for this, and this because the testator never supposed the devisees held an equal interest in the different species of property. I am firmly persuaded, that when the testator made so great a change as giving the widow

(Roberjot v. Mazuric.)

two-thirds instead of one, when he transcribed the devise to his wife and son from the first will, he was struck, paused, and reflected,—“This is taking too much from my only child, our beloved son *James*,” as he calls him, and having lifted up the pen with this reflection, he put it again on the paper, to declare, that “at the death of his mother he becomes sole heir of all I have bequeathed her.” This was a paramount intention, and, standing alone in the will, would perhaps of itself cut down all to a life estate. It is a declaration to this import: “Whatever terms are used in devising my estate, it is my intention that on the death of my wife, my son shall be sole heir of all I have bequeathed her.” All I have bequeathed to her, takes in both real and personal estate, and sole heir would not restrain it; for making him heir of all, is making him devisee of all: it is the strongest term an unlearned man could use. I make my son my sole heir of all I have, would amount to a bequest both of real and personal estate. But when this will is taken as the fundamental testamentary act, the codicil, as the testator expresses it, but a supplementary act, and the testator setting out with a declaration that the alteration was not intended to injure his son, and certainly not made with any intention of repealing the first act, it is to be taken in connection with it, a modification, a continuation of the succession of his property; and when it again and again speaks of a life estate, and a further disposition on the termination of these lives, it is not doing justice to this will to say it is obscure, when viewing it as a whole and entire plan, it leaves the mind free from all doubt. It affords a strong light, sufficient for the court to discern the clear intention in the testator to give life estates to his son and wife in succession,—remainder, on the death of his son without children, to his real heirs.

If this construction was more doubtful than it appears to me to be, and my mind was in equilibrio, I think the reasonableness of the one construction should prevail. If there had been a precise meaning ascertained to give the wife the personal property absolutely, no reasoning from supposed cases should induce the court to put a different construction on the will; but, in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction and another, have constantly been attended to. It is almost inconsistent with humanity to suppose that a father should forbid his only son, that son an infant who had never offended him, the enjoyment and disposition of the capital of all the personal estate, even the one-third he had given him, for the sake of remote relations, and should leave to his widow the absolute power and dominion over two-thirds of it. His wife, his son, and his son's children were intended to take his whole estate; and, on his son's death without children, all was to go over to remote branches of his family. He continues his property, as far as the law will permit per-

(Roberjot v. Mazurie.)

petuity, in his family. It is not to go to strangers,—a wish natural to almost the whole of the human race. As to the expressions of the devise of the real and personal estate, to be absolutely and for ever, though this, standing alone, would give the defendant an entire property in both estates, yet it is admitted that the testator has manifested a different intention as to the real estate. There are no words too strong for intention, whether it appears by subsequent express explanations or manifest implication. The implication must be plain to abridge an express estate: it must be such a conclusion as satisfies the mind of the judge of the intention; but necessary implication does not mean natural necessity, but so strong a probability, that no intention to the contrary ought to be presumed. Circumstances are sufficient to qualify and restrain general expressions, which are controlled to make the will consistent; and if two parts of the will are irreconcilable, the latter must give way to the former. Indeed, there are no words of so stubborn and inflexible a nature, as will not bend to the intention of the testator when it can be collected from the whole context. So far has reason prevailed over a rigid adherence to the legal, and even common meaning of words, that real estate has been decided to pass under the denomination of personal. So the word legacy has included lands, (*Hope v. Taylor*, 1 Burr. 268;) an express estate for life, and no longer, construed an estate tail, by necessary implication, to effectuate the general intention of the testator. *Robinson v. Robinson*, 1 Burr. 38. My personal estate, absolutely and for ever, does not more fully convey the whole property in personal estate, than a devise for life, and no longer, conveys but an estate for life. Yet the one may be explained to intend only an estate for life, as the other may be intended to give a longer estate than for life, though in the strong language of, for life and no longer.

For these reasons, I am clearly of opinion that sufficient appears on the face of this will, to show that the testator only intended his wife should have but an estate for life in both his real and personal estate, except in the specific bequest, which she is entitled to absolutely, and the court direct judgment so to be entered on the case stated.

Judgment for the plaintiff.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1826.

[PHILADELPHIA, MARCH 27, 1826.]

CURCIER and others *against* PENNOCK.

IN ERROR.

Whether one who has a share in the profits of a commercial firm, under an agreement not to be liable for losses, be a dormant partner or not, and as such answerable for the debts of the firm, he is not a competent witness for the firm in an action in which they are plaintiffs, unless he has executed a release of all his interest in the suit; in which case he is competent, because, admitting his liability for debts, his interest is too remote to affect his competency, provided there be no evidence of the inability of the other partners to pay the debts of the firm.

The defendant having in his possession a quantity of coin, which he believed to be current money of *Cayenne*, offered to give it to the plaintiffs for goods. The plaintiffs being ignorant of its value asked time for inquiry, and having taken several days for that purpose, during which they satisfied themselves on the subject, delivered to the defendant a quantity of goods, for which they received the coin. After having kept it three years, they discovered that it was spurious, upon which they brought an action against the defendant for goods sold and delivered. There was no suggestion of fraud in the defendant, nor was any warranty alleged. *Held*, that the action could not be supported.

FROM the record of this case, returned on a writ of error, from the District Court for the city and county of *Philadelphia*, it appeared that in the month of *August*, 1817, the defendant in error, who was defendant below, called upon the plaintiffs in error and said he wished to sell or exchange *Cayenne* money for goods. The plaintiffs said they did not know the value of the money, but would inquire, and if it was worth what the defendant asked, they would sell him the goods at the prices they sold to others.

(Curcier and others v. Pennock.)

The defendant left a sample of the coin with the plaintiffs, who made inquiries as to its value. The next day, or two or three days afterwards, the defendant called, and the plaintiffs agreed to take the coin at the price he had fixed. The defendant selected the goods he wanted to the amount of the coin, some of which was counted, and the rest weighed. The goods were delivered, and the *Cayenne* money received. The entry in the plaintiffs' books was as follows:—"Cayenne money, dr. to merchandize; \$718,25." Thus the matter rested until the summer of 1820, when on the arrival of a vessel from *Cayenne*, the plaintiffs offered the money to the captain, who refused to receive it, alleging that it was counterfeit. The plaintiffs then, without any offer to return the coin to defendant, commenced this action, in which they declared for goods sold and delivered. It was proved on the trial, that the money was spurious.

In the course of the trial, the plaintiffs produced *John T. David*, who it was proved was a clerk in the plaintiffs' house, and was to receive as a compensation for his services, one-fifth, or one-sixth of the profits, without being subject to losses. After having executed to the plaintiffs a release of all his interest in the suit, he was offered by them, as a witness; but objected to by the counsel for the defendant, as incompetent on the ground of interest, and rejected by the court, who at the request of the counsel of the plaintiffs, sealed a bill of exceptions.

The court below, after the evidence was closed, charged the jury in the following manner:

"The defendant contends there was no sale of goods to him by the plaintiffs; that no deceit or fraud was alleged or proved; that there was no warranty, as to the goodness or value of the coin; that the coin was not spurious, but the money current in *Cayenne*; that the plaintiffs did not return or tender the coin before action brought. If a man sells goods to another, for money or bank notes, and the money paid is counterfeit, or the notes forged, the vendor may resort to the original contract, because he was to be paid in money, and he has not received what the purchaser engaged and contracted to pay. But if goods be sold, or taken in exchange or payment, and they turn out not to be of so much value, or as good, or different from what the parties supposed them to be, and both parties had seen the goods, the parties are bound, unless there be a warranty, or fraud, or deceit. Here there was no warranty, no deceit or fraud alleged or proven. This action is not founded on a warranty or fraud. There was no sale of goods to the defendant. It was rather a sale of coin to the plaintiffs, or an exchange of coin for goods. It was not a sale of goods for money current here. The plaintiffs agreed to take the coin, if upon inquiry it was worth what the defendant asked for it. The plaintiffs did inquire, and agreed to take it; they had the opportunity to judge for themselves, and they are bound. The

(Curcier and others v. Pennock.)

cases cited by the plaintiffs' counsel, do not apply. The defendant performed his contract; he gave what he promised; the plaintiffs saw the coin, and were as capable of judging of its value as the defendant, and they had an opportunity to enquire and be informed, and they did. It does not appear that the defendant knew the coin better than the plaintiffs, and there was no warranty by the defendant. The law we consider as settled.

"In point of fact, was the coin spurious, as alleged? This depends upon the evidence, and it is by no means certain that it was not current at one time at *Cayenne*. If it was spurious, it does not appear that the defendant knew it to be so; he did not say it was genuine.

"As to the return or tender of the coin, before the action was brought, it is a point reserved to be considered, if necessary.

"We are of opinion, that the law of the case, is with the defendant."

Read and Randall, for the plaintiffs in error.

1. Was *David* a competent witness? He was but a clerk; he had a share of profits for his services, but was not liable for losses, and consequently was not a partner. But considering him as a dormant partner, it was not necessary to join him in the action; and that circumstanced as he was, he was a witness, was decided in *Mawman v. Gillett*, 2 *Taunt.* 325, (note.) Besides, he released all his interest to the plaintiffs, and was not liable to contribute to the costs, because he was not to be liable for losses. He might, perhaps, be liable to third persons for the partnership debts, but that is too remote an interest to affect his competency, for *non constat* that the partnership funds were insufficient to pay the debts. *Willing v. Consequa*, 1 *Peters' Rep.* 306. 1 *Phill. Ev.* 39, 42. *Gow on Part.* 21, (*Ingraham's Ed.*) *Gill v. Kuhn*, 6 *Serg. & Rawle*, 333. *Porter v. Cresson*, 10 *Serg. & Rawle*, 257: 1 *Montague*, 166. *Parsons v. Crosby*, 5 *Esp. Rep.* 199. *Patton v. Ash*, 7 *Serg. & Rawle*, 116. *Richter v. Selin*, 8 *Serg. & Rawle*, 436. *Stoever v. Stoever*, 9 *Serg. & Rawle*, 434. *Fetterman v. Plumer*, 9 *Serg. & Rawle*, 20. *Henderson v. Lewis*, 9 *Serg. & Rawle*, 379. *Dornick v. Reichenback*, 10 *Serg. & Rawle*, 84.

2. Could this action be maintained upon the evidence given in the court below? If the coin was counterfeit, the plaintiffs had a right to consider it a nullity, and treat the transaction as one of goods sold and delivered. It was not an exchange, but a sale for *Cayenne* money. The court charged, that even if it was counterfeit coin, the plaintiffs could not recover. This is directly contrary to the authorities, which decide that the plaintiffs may in such cases, resort to the original cause of action. *Markle v. Hatfield*, 2 *Johns.* 455. *Young v. Adams*, 6 *Mass. Rep.* 182. *Ritchie v. Summers*, 3 *Yeates*, 532.

Mahany and Potts, for the defendant in error.

The evidence of *Davis* was properly rejected, because whate-

(Curcier and others v. Pennock.)

ver arrangement may have existed between themselves, he was a partner as respects third persons. 2 *Bl. Reports*, 999. 6 *Serg. & Rawle*, 337, *Id.* 259. *Watson on Part.* 9. If he was a partner, he was interested in the event of the suit, and the release would not remove his interest, for he was liable for the debts of the firm *Willing v. Consequa*, 1 *Peters' Rep.* 301. *Gow on Part.* 171.

2. The transaction between the parties was not a sale, but an exchange of *Cayenne* money for goods. This kind of money, which once passed in *France*, was an article of commerce. The evidence, therefore, did not support the declaration. The action should have been special, and the declaration should have alleged fraud or warranty. *Snell v. Moses*, 1 *Johns.* 97. *Seixas v. Wood*, 2 *Gaines*, 48. *Perry v. Aaron*, 1 *Johns.* 129. *Id.* 274. 2 *Johns.* 179, (note.) 4 *Johns.* 421. 2 *Com. on Cont.* 268. *Bree v. Holbec*, *Doug.* 654.

TILGHMAN, C. J. The first error assigned in this cause, is the rejection of the evidence of *John T. David*, a witness produced on the part of the plaintiffs, *Andrew Curcier* and others. It was proved that *David* was a clerk in the house of the plaintiffs, and was to receive by way of compensation for his services, either one-fifth, or one-sixth of the profits, without being subject to losses. Under these circumstances, he was held to be incompetent, because interested, although he had executed a release to the plaintiffs, before he was offered as a witness. I shall not now inquire whether the receiving a share of the profits did not place *David* in the situation of a partner as to creditors. But assuming, for the sake of the argument, that he might be a dormant partner, it remains to be considered in what manner he was interested in the event of this suit. If he had not released to the plaintiffs, he would have been clearly interested, because a recovery in this action would have increased the profits of the firm, and consequently it would have increased the share of the witness. But it is said that he was interested notwithstanding the release, because he was responsible for the debts of the firm, and if the plaintiffs fail in this suit, the fund for payment of debts will be diminished. But this is too remote and contingent an interest, to affect the competency of a witness. There was no evidence of the inability of the other partner, to pay the debts of the firm, and therefore it was altogether uncertain whether *David* would ever be called on. This very point was decided by the Circuit Court of the *United States*, in *Willing v. Consequa*, (1 *Peters*, 301,) and I agree with the opinion delivered in that case. The interest is not of that direct and immediate kind, which the law requires, to incapacitate a witness. It is an objection which goes to his credit, but not his competency. I am of opinion, therefore, that the evidence of *David* was improperly rejected.

(Curcier and others v. Pennock.)

Error was assigned also in the charge of the District Court, and as this cause is to go to a second trial, it is necessary that we should give our opinion on the charge. There was no special verdict, but the charge was given on the facts proved by the evidence of the witnesses. As those facts appeared to the District Court, and as they appear to me, the defendant had in his possession, in the year 1817, a quantity of coin, which he supposed to be current money of *Cayenne*. In the same year, he offered to give this coin to the plaintiffs for goods. The plaintiffs, being ignorant of the value of such coin, asked time for inquiry, and having taken several days for that purpose, during which they satisfied themselves, they bargained with the defendant, and sold and delivered him a certain quantity of goods, for which they received the coin. The plaintiffs having kept it three years, were informed that it was spurious, upon which, without offering to return it to the defendant, they brought this action against him for money had and received for their use. There was no suggestion of fraud in the defendant. But the plaintiffs endeavoured to support their action on this principle,—that they sold their goods to the defendant for a certain sum to be paid in foreign money, and the money being counterfeit, the contract was void. It is evident, that in taking this ground they assume an important fact, denied by the defendant, viz. that he agreed to pay a certain sum in foreign money. On this state of the case, I should not differ from the plaintiffs' counsel. But the transaction appears to me to be rather in the nature of an *exchange* of the property. The plaintiffs gave goods, for which they received from the defendant in exchange a copper coin, which both parties supposed to be genuine money of *Cayenne*. The plaintiffs exercised their own judgment for several days in ascertaining the value of this coin; and finally received it on their own judgment, without any warranty or engagement on the part of the defendant. They kept it for three years, and even then did not offer to return it to the defendant, as I incline to think, though I have not formed a decided opinion, they ought to have done; for, whether lawful coin or not, being of copper, it had an intrinsic value. Besides, the delay of three years was unreasonable. If it had been returned in a short time after its receipt, the defendant might perhaps have had recourse to the person from whom he received it. But after three years, that was hardly to be expected. As to the excuse of the plaintiffs, that they had no opportunity, sooner, of ascertaining that the coin was counterfeit, it is not satisfactory. It was their business to make inquiry sooner, and it is not perceived that there could have been any difficulty in ascertaining the nature of the coin. I agree, that if one sells goods, for bank notes of another state, which prove counterfeit, he may avoid the contract and recover his money. But even there, where the case is much stronger than that before us, notice must be given in a reasonable time. I do not think an action for money had,

(Curcier and others v. Pennock.)

&c. would lie after three years, if the plaintiff knew where the defendant was to be found in the meantime: Nor would it be taken for a good excuse, if the plaintiff should say, that he had kept the notes in his closet, without an opportunity of knowing that they were counterfeit. It was decided by this court, in the case of *Raymond v. Baar*, at *Chambersburg*, last *October Term*,* that the plaintiff, who had received a counterfeit bank note for goods sold, and kept it six months, after he knew it to be counterfeit, without giving notice to the defendant, could not support his action. There, to be sure, the plaintiff *knew* that the note was counterfeit six months before he informed the defendant of it. But the case before us appears to me to be quite as strong, because, instead of six months the plaintiff kept the coin three years, long before the end of which time he might, and ought to have known that it was spurious. There is no need of entering into a minute examination of every part of the charge of the District Court. In the main conclusion, that on the evidence given the plaintiffs were not entitled to a verdict, I think it was right. The judgment must be reversed, however, for the error in rejecting the evidence of *John T. David*, and a *venire facias de novo* awarded.

GIBSON, J. Where there is a sale on terms of receiving payment in foreign coin, generally, I agree that payment in counterfeit coin will not discharge the debt; and this is all that can be demanded in the way of concession. But was this transaction a sale of goods, to be paid for in foreign coin generally, or an exchange of goods for particular pieces of foreign coin, article for article? The defendant proposes to *sell* a cask of *Cayenne* money, or *exchange* it for goods, and leaves samples with the plaintiffs, who after satisfying themselves of its value, agree to give goods at the current prices to the amount; and, on this footing, a bargain is struck. Now, it is difficult to determine whether the plaintiffs took the *Cayenne* money in payment of their goods, or the defendant took the goods in payment of his *Cayenne* money; but that the identical pieces of coin to be received for the goods, were fixed by the agreement of the parties, is not to be doubted; and that is conclusive to show that they meant to treat the *Cayenne* money, in every other respect than the name, as an article of commerce. The agreement was not, that the defendant should buy goods to be paid for in the coin of a particular country, at the current rate of exchange, but the identical pieces were specified, examined, and received at a value fixed by the parties themselves. If, then, they thought fit to treat this coin as a commodity, might they not invest it with the attributes and properties of a commodity? That it presents itself to the senses in the shape of coin, furnishes no objection; for

* 13 Serg. & Rawle, 318.

(Curcier and others v. Pennock.)

the *Nuremberg* counters, so common at card tables a few years back, although in the shape of guineas, and little more base in their composition than the genuine coin of *Cayenne*, were undoubtedly a commodity. Nor is it material that this money was the counterfeit presentment of the coin of an obscure country in a remote corner of the world. The gum of the kingdom of *Senegal* is its only currency; yet with us, it enters into the transactions of commerce exclusively as a commodity; and no one will doubt that payment in gum not merchantable would, even in *Senegal*, discharge the debt; and so would payment in tobacco have done, while it was the circulating medium of *Maryland* and *Virginia*. But I go further, and affirm that the coin struck at the mint of the *United States*, may be divested of the character of money and bargained for as a commodity. The reason why payment in money which is counterfeit, or for any other cause worthless, does not discharge the debt, is that the seller has not got the thing for which he bargained; but it cannot be affirmed that he has not got it, when the identical thing is produced, examined, and accepted at the time of the bargain. The current coin of the country, therefore, may, by an explicit agreement of the parties, be taken at the risk of the seller: but I admit that the presumption would be against the existence of such an agreement, till it were shown. However, in a transaction like the present, where warranty or deceit is not pretended, I am of opinion that the seller receives the thing at his own risk.

On the ground of authority I concur that *John T. David* was a competent witness, and, for that reason, that the judgment be reversed.

DUNCAN, J. To prove the contract, one *David* was offered as a witness,—his competency was objected to. It appeared that at the time the goods were sold, *David* had some interest in the plaintiffs' firm, though his name did not appear as a partner. He put nothing in, nor had he authority to sign the firm's name. His share of the profits for his services, as clerk, was one-fifth or one-sixth; it was by way of compensation. The witness released to the plaintiffs, and the court refused to suffer him to be examined, either on his *voir dire* or in chief. *David*, on this evidence, was clearly a dormant partner. A participation of profits and loss is one of the qualities of such partnership. In many parts of *Europe* limited partnerships are admitted; but by the law of *England*, which is in this particular, the law of *Pennsylvania*, it is otherwise; the rule being, that if a partner shares in the advantage, he shares in the disadvantage, but it is not necessary that the shares should be equal. *Coope and others v. Eyre and others*, 1 H. Bl. 48. It is true, that a secret partnership can be no consideration to the vendee, yet, for reasons of policy and general expediency, the law is positive with respect to secret partners, that when dis-

(Curcier and others v. Pennock.)

covered they shall be liable to the whole extent. But the witness being a dormant partner, the non-joinder of him as plaintiff is no ground of nonsuit. *Lloyd v. Archbowl*, 2 Taunt. 324. *Wilson Wallace's Executors*, 8 Serg. & Rawle, 55. The objection is therefore to be maintained on the ground of interest. When the case of *Mawman v. Gillett*, was cited to prove the position, that a dormant partner without releasing could be received as a witness, I must own I was surprised, but on an attentive consideration of that case, it will be found not to establish the general position, because that was a case rather of sub-contract, than one of original partnership. *Gow*, (121,) states it as being decided on that principle. "In an action," says that author, referring to *Mawman v. Gillett*, 2 Taunt. 325, (note,) "on a contract, a dormant partner, not being one of the contracting parties, and who has no privity of communication with them, on the subject of the contract, is competent to prove the contract." That was a case where the ostensible proprietor of materials entered into a contract for work to be done thereon, and the witness had secretly purchased from him a share, but was no party to the contract. If there had been a solitary decision to the effect contended for, it could not prevail against the inflexible rule of evidence that interest renders any man an incompetent witness. The interest would have been direct, and the witness could not be received. His share of the profits would have diminished or increased according to the event of the trial; but I know not of any interest that a man cannot divest himself of by release. By releasing to the plaintiffs his share of all interest in this action, he released to them all share of the profits. If the plaintiffs succeeded, the witness reaped no benefit from their success; if they failed, he lost nothing, because he released all. And, as to the argument that he is liable to the creditors of the partnership, and that this would increase the fund for the payment of the debts, *non constat* that there are any, or any deficiency; and the bare possibility of any action being brought against the witness, is no objection to his competency. *Carter v. Penrose*, 1 T. R. 164. Indeed, this objection falls within the reason of the decision of *Willing v. Consequa*, 1 Peters, 301, if not within its very letter. There it was held, that the possibility of a liability as a dormant partner was too remote, and certainly did not exclude him. And, as to the costs, if the plaintiffs were cast in the action, having accepted of the release, and taken the debt to themselves, he never could have recourse to the dormant partner for any share of the costs, and certainly the witness is neither directly nor by any circuitry, accountable to the defendant for costs. It has been ruled, that a person who suffers his name to be used in a firm as partner, if in fact he is not so, nor has any share in the business or profits, may be a witness for the person who is joined with him, and who is the only person entitled, in an action for goods sold and delivered, to prove the contract. *Parsons v. Crosby*, 5 Esp. N. P.

(Curcier and others v. Pennock.)

C. 199. *Grossop v. Colmer*, 1 Stark. N. P. C. 25. In every aspect, the contingent liability was not more remote than it is in this case. In *Clarke v. Carle*, 3 Cowen, 84, it was held, that a dormant partner need not be a party to the suit, and, on releasing or selling his interest to his co-partner, he may be a witness for him. The witness ought to have been received. It was a simple question whether he was to be benefited by the decision. Having released, he could not receive a benefit, nor was he exposed to any loss. Judgment must be reversed, and a *venire facias de novo* issued. It is made the duty of the court, when a cause is remanded, to give their opinion on all the questions decided below and excepted to here.

Without relation to the form of action, *indebitatus assumpsit* for goods sold and delivered, and not on any warranty of the quality of the article received in satisfaction of the goods, or any fraud in the dealing, could any action be supported? And, if it could, can this be supported on the state of the evidence? It is certainly a new case. I do not think it is governed by the doctrine of warranty of quality, or sale of the goods. As I understand this case, it was a sale of goods, not for the current money of the country, but for the money of a foreign country. The defendant called at the plaintiffs' store, and said he wanted to sell or exchange *Cayenne* money for goods. The plaintiffs agreed to take *Cayenne* money, and goods were sold to him on his own selection, at the usual sale prices. A sample of money, as if genuine money, was left at the store for the purpose of inquiring into its value as money, not its quality as metal. If counterfeit, it could be of no more use than old copper, an article in which the plaintiffs did not deal as an article of commerce. Its intrinsic quality required no inquiry,—it was worth nothing. The maxim, *caveat emptor*, has no relation to such dealing. Without any particular warranty, there is an implied one in every such contract, that is, that the description is sufficient evidence of warranty. The plaintiffs had a right to expect a passable article, answering the description of *Cayenne* money,—a thing that would pass in the *Cayenne* market as money; but got a thing, which, if they did pass it in that market as money, would lead them to the gallows. He described it as *Cayenne* money, and accepted goods to the amount he said the *Cayenne* money was worth. In *Young v. Adams*, it was a note payable in foreign bills,—bank notes. Bills were received, and the note given up. A five dollar bill was shortly afterwards discovered to be counterfeit. The foreign bank notes were considered as foreign coin, and it was held, that if due diligence is used, and they are returned seasonably to the payee the former demand revives, or the receiver becomes entitled to some equitable remedy for the deficiency of the intended payment, discovered by the event. The question of diligence and seasonable return depends on the special circumstances of each case, and this is a case under very

(Curcier and others v. Pennock.)

uncommon circumstances. It was not submitted to the jury, whose province it was to decide on the negligence. Indeed, if the delivery had been made the next day, and communicated to the defendant, under the opinion of the court, the plaintiffs could not recover, because it did not appear, but that the plaintiffs knew the coin as well as the defendant; and, as there was no warranty or deceit, there could be no recovery. So that, taking the charge of the court as it must have been understood by the jury, it was, that if the money was spurious and bad, and the defendant did not know or assert it to be genuine, he could not recover. It was not left to the jury to decide on the genuineness or falsity of the coin; but, whether genuine or not, still the plaintiffs could not recover. I am not of this opinion. This was a sale of goods, at the common rates for foreign money. I consider it as if the plaintiffs had taken the defendant's notes for the price of the goods, payable in *Cayenne* money, and the defendant had given in payment this brass or copper as true money, and there was no fraud committed by the defendant and no express undertaking. I think an action would lie, and would lie in this form. The principles of fair dealing require that a mistake of this kind, after the mistake had been discovered and proved, should not be insisted on by the party who has the undue advantage, even when gained without any intention to defraud. This was the opinion of the court in *Young v. Adams*, 6 *Mass. Rep.* 182, in a case not to be distinguished from this, which will be noticed hereafter. In *Puckford v. Maxwell*, 6 *Term Rep.* 52, the plaintiff agreed to accept a draft in payment. The draft was dishonoured, there being no fraud in the transaction. Lord KENYON said, in cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not then what it purports to be, and what the party receiving it expects it to be; and therefore he may consider it a nullity, and act as if no such bill had been given at all. The case of *Owenson v. Morse*, 7 *T. R.* 64, is very strong to the same effect. It was an action of trover for goods, brought against the tradesman who had sold them, and it was there held, if the seller of goods takes notes or bills for them, without agreeing to run the risk of the notes not being paid, and the notes turn out to be worth nothing, this will not be considered as payment. And Lord KENYON thus strongly expressed himself: "This is an exercise of ingenuity on the part of the plaintiff,—it is an unjust attempt to take from an honest tradesman certain goods, which the latter meant to sell on receiving a fair price for them; and the question is, whether the tradesman shall be obliged to give them to the plaintiff without being paid for them. To be sure, if the law were with the plaintiff, we could only lament; but the law and justice of the case are clearly with the defendant."

This case has no relation to common articles of merchandize and the sale thereof. It was a disposition of foreign money,—coin bartered for goods, (I care not what name is given to the contract,)

(Curcier and others v. Pennock.)

at the selling price, and the thing taken as money of *Cayenne*, was that which never was the true coin of that country, and never passed as such, according to the testimony of one witness, if not more,—but at the risk of the neck of the party passing it. The vendor of the goods contracted for money—that which he got for his goods never was money current any where. There is great difference between an article whose value is intrinsic, and that whose value is not so, but depends on its being the representation of value. Money is a sign which represents the value of all commodities, bearing the impress of the authority by which it was issued, and made a standard of value. It may be in metal, in leather, or in paper. Metal is the most proper for a common measure. Every nation fixes its own impression. It is the government, the arbiter of domestic concerns, whose authority gives it currency. This is stated, in the evidence, to be false coin,—the false coin bends, the genuine does not. The genuine has silver mixed with copper; the false is made of copper alone. There is no genuine coin of *Cayenne* of copper alone. The witnesses specified their knowledge of this being counterfeit money. This was a contract where the goods of the vendor were valued at their true intrinsic value in current money; for which he agreed to take, and the vendee to give, not current money of the country, but foreign money at the current value in that country, by whose authority it purported to have been issued. The sample delivered was not delivered as a sample of the quality of the article or metal, but a sample designating a species of currency, to ascertain what the value of such species of currency was in that country. It is the case, in principle, of a man going into another man's house, and saying, "I will take your goods at the selling price, if you will take my *Kentucky* notes at the passing value in *Kentucky*." Time is given to make the inquiry; the passing value is ascertained; the notes are accepted in payment of the goods at that value; the goods are delivered; but, instead of being genuine *Kentucky* bank notes, they turn out to be counterfeit. On every principle, the contract is null, and the party may rescind it. It can make no difference whether the false representation of value be impressed on the metal, or expressed on paper; was a counterfeit bank note or counterfeit coin. The case of *Young v. Adams* before referred to, shows what would be the right of the vendor in case of receiving counterfeit bank notes. There the action was not on a warranty, or for the deceit, but *assumpsit*. In fact, there was neither deceit nor representation, and the argument opposed to the recovery was the same as it is here,—because the bank notes, when they are offered in payment and accepted, without any warranty of their genuineness by the payor, as he is not *provable* guilty of knowing them to be false, the receiver takes at his own risk, and has no remedy for any mistake. But the court repelled this harsh and impure doctrine in a very able opinion de-

(Curcier and others v. Pennock.)

livered by Mr. Justice SEWELL. The only case I can find in the *English* books, is that of *Vance v. Stedley*, cited in *Wade's Case*, 5 Co. 115, where a lessee paid his rent to his lessor, who received it and put it into his purse; and immediately after, on looking at it again, he found the money had some counterfeit pieces, and therefore he refused to carry it away, but re-entered for the condition broken. It was adjudged that the entry was not lawful; for when the lessee had accepted the money, it was at his own peril, and after the allowance he shall not take exception to any part of it. Judge SEWELL gives a very satisfactory answer to this. It was so decided, not because it was a good discharge of the debt, but because payment of the rent being accepted, it was understood as a saving of the lessee's forfeiture, and is not a decision that the lessor had no remedy for the deficiency in the money paid. And every body knows that it is not a satisfaction of the debt, no matter whether counterfeit foreign coin, or legalized currency; whether doubloons or pistoles, rubles or stivers, eagles or dollars, the payment would not be good.

The reason why acceptance of a forged check concludes the acceptor, is because he is presumed to know the handwriting of the drawer, and takes upon himself that knowledge; but a man who takes *Cayenne* money is not presumed to know that it is genuine, when it is offered to him. It is offered to him, because it represents itself to be a genuine currency of the country whose impress it bears, and he takes it on the faith of that representation. In a cause decided at the last session of the southern district of this court, a bank bill was taken in payment for goods, which turned out to be counterfeit. The action for the goods was held to be maintainable; but it was decided, that the vendor having kept the bill many months after it was discovered to be counterfeit, and the defendant, his neighbour, never informed of this, nor demand made, nor offer to return the bill, could not recover, because, had he returned it seasonably, the vendee might have had recourse to the man from whom he got it; but, after such a lapse of time, all recollection, or possibility of recovery would be done away. At first my impression was, that the plaintiffs were barred by so long keeping the article; but, on reflection, the article being of no value, the country a remote one, and, for aught that appeared, this being the first vessel to this port from that distant clime, and it being in the power of a man who had bought a barrel of this counterfeit money to recollect from whom he received it, my opinion is, that it should be left to the jury to determine whether there has been such negligence on the part of the plaintiffs to inform themselves, that the defendant might reasonably be supposed to be prejudiced; and, if they so found, that the verdict should be for the defendant. If that were not the case, my opinion is, that in this course of dealing, the article not being the money of any country, a counterfeit coin, exposing the man who offered to pass it in *Cayenne* to the

(Curcier and others v. Pennock.)

gallows, if the plaintiffs gave evidence of information in a reasonable time after they knew it was not genuine to the defendant, and demanded the price of the goods, they could sustain the action in this form, and that without carrying the worthless trash to the defendant's counting-house, and making a formal tender of it. The jury, under all the circumstances, ought to say whether the plaintiffs have been guilty of negligence, in not sooner informing the defendant that the coin was base, by which he has been prejudiced, and whether the return of the metal could at any time have bettered his situation. If this had been an exchange, as the District Court would seem to have thought it, the defendant would still be liable. In *Jones v. Ryder*, 5 Taunt. 492, the court considered the transaction in the nature of an exchange. The defendant possessing a money bill professing to be a general money bill, and representing it as such, the plaintiff gave him in exchange therefor a sum of money equivalent to the amount, supposing the bill to be genuine. The bill turned out to be forged,—the plaintiff brought his action as for money had and received to his use, and the action was sustained. Both parties said the court were mistaken in the view they had of money bills. Upon its turning out the bill was forged, the money ought to have been refunded. A case was referred to as decisive, by Chief Justice MANSFIELD at *Nisi Prius*, namely, where forged bank notes are taken, the party negotiating them is not and does profess to be answerable, that the Bank of England shall pay the notes, but he is answerable for the bills being such as they purport to be. The principle was acknowledged in *The U. S. Bank v. Bank of Georgia*, 10 Wheat. 333,—that a payment received in forged paper or a base coin, is not good, and if there be no negligence in the party, he can recover back the consideration paid for them, or sue upon his original demand. Negligence, in the case of forged paper, absolves the payee from all responsibility; but this widely differs from an exchange of base coin in a box or barrel. In the case of forged bank notes, the holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be changed; but here, if it appeared that the first opportunity when offered to ascertain the genuineness of the coin was embraced, and notice given, there could be no negligence. In this case, if the defendant is to be absolved from liability, it is by showing that he acquired the article *bona fide* as foreign money from the party from whom he received it, and then if the jury find negligence in the plaintiffs, it may discharge the defendant. In that case, in an exchange like the present, the law would presume a damage, either actual or probable, sufficient to repel the claim against him.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, APRIL 10, 1826.]

Case of the Appeal of ANN M'GLINSEY, Widow and Administratrix of JOHN M'GLINSEY, deceased, from the Decree of the Orphans' Court of Philadelphia County.

APPEAL.

Where the wife permits her husband to receive the rents of an estate, conveyed in trust for her separate use, by the husband after marriage; where they live together, and the rents are generally laid out by the husband, together with his own money, in the purchase of goods for a store kept in the name of the wife, in their dwelling-house, and, on his dying intestate, the wife, as his administratrix, accounts for the goods in the store as his, she is not entitled, on the settlement of her administration account, to retain, against the estate of her husband, the amount of the rents received by him.
Of the proper allowance for funeral expenses.

On the hearing of this case, it appeared that on the 8th of *March*, 1819, *John M'Glinsey* and wife conveyed to *Joseph Simons* a house at the corner of Second and South Streets, in the city of *Philadelphia*, in trust for the sole and separate use of the wife for life, and, after her death, for the use of the husband. On the same day, the trustee gave to the wife a power of attorney to receive the rents of the house, and never received any of them himself. *M'Glinsey* and his wife lived together on very good terms. He received the rents, and generally laid them out in goods for a store kept by his wife. On his death, the appellant accounted for the store goods as his. In settling the administration account, she charged the sum of one thousand seven hundred and sixty dollars and twenty-five cents, as retained by her in satisfaction of her claim against the intestate, for rents of her private estate received by him during his life, with interest from the time of his death. She charged the sum of three hundred and fifty-eight dollars and seventy-five cents for funeral expenses, including a vault and tombstone. The Orphans' Court rejected the whole of the first mentioned claim, and allowed but one hundred and thirty-nine dollars and thirty-seven cents, one half of the amount charged, for funeral expenses. From the decree of the Orphans' Court, the administratrix entered an appeal to this court.

Kittera, for the appellant, observed, that chancery, considering the separate estate of the wife as belonging to her, with power to dispose of it by her voluntary act, this case presented a question of fact, viz. whether the wife had made to her husband a gift of the rents of her separate estate? From his receipts, it appears that he received the rents as her *agent*; and, having received as an agent, he must account as an agent. If the court have any difficulty as to the fact, they may direct an issue to be tried by a jury.

2. The intestate having left a considerable estate, and no children, the sum charged for funeral expenses was not unreasonable.

(Case of the Appeal of Ann M'Glinsey, Administratrix of John M'Glinsey.) ;

Chew, contra.

1. It is an important feature of this case, that the separate property of the wife was the voluntary gift of the husband after marriage, and that as to the store, said to be the wife's, the husband was active in purchasing goods at auction. The principles which govern the point in controversy are well established. Where the wife permits the husband to receive the rents of her separate estate, the most favourable presumption is made for the husband. 7 *Johns. Ch. R.* 117. 3 *Johns. Ch. R.* 77. 17 *Johns.* 548. The wife is not admitted in equity to recover against her husband's estate, if she has permitted him during his life to receive the interest of her personal estate. *Powell v. Hankey*, 2 *P. Wms.* 82. *Cluney on the Rights of Married Women*, 168, 169. If husband and wife are living together, and she permits him to receive the profits of her estate, she is not entitled, after his death, to an account against his representatives. *Dalbrai v. Dalbrai*, 16 *Vez.* 125. Where the husband supplies his wife with necessaries, she shall not have an account for arrears of pin money. *Fowler v. Fowler*, 3 *P. Wms.* 353. The court will not follow the personal property of the wife, through its various changes in the hands of the husband, without a positive agreement. It is of little moment, that the store was called hers. He purchased the goods at auction, and gave his own notes for the price. The interest in the store was his, and so she accounted for it after his death.

2. The sum charged for funeral expenses was too high. A liberal allowance was made by the Orphans' Court, and if the appellant wished to go to greater expense, she ought to pay it herself.

The opinion of the court was delivered by

TILGHMAN, C. J. The first exception to the decree is, that the Orphans' Court rejected the claim of the appellant to the sum of one thousand seven hundred and sixty dollars and twenty-five cents, money received by her husband in his lifetime, from the rents of a house, which was the separate property of the wife. This house, originally the property of the husband, was conveyed by him to *Joseph Simons* in fee, to be held in trust for the wife, as her separate estate. The husband and wife had no children; and lived together in great harmony to the time of his death. The trustee never received the rents of the house. They were paid by the tenant, with the wife's knowledge and approbation, to the husband, who generally laid them out in goods for a store kept in his dwelling-house. This store was attended by the wife, and generally called *Mrs. M'Glinsey's* store; but the husband did the out of doors business, and, particularly, was in the habit of purchasing goods at auction to a much larger amount than the rents of his wife's separate estate. He died intestate, and the appellant, who administered, accounted for the store goods as the estate of her husband. It is a general principle, that where the wife permits

(Case of the Appeal of Ann M^cGlinsey, Administratrix of John M^cGlinsey.)

her husband to receive the profits of her separate estate, and particularly where they live together, and the expenses of house-keeping are paid by him, the presumption is, that it was the intention of the wife to make a gift of the profits to the husband. And there is great reason for this presumption, because the husband being in the receipt of this money, may be induced to live at a greater expense than he would otherwise have done, whereby the comforts of his wife, as well as his own, are increased. To call him to account, therefore, after the lapse of a number of years, might be ruinous, and would certainly be unjust. This principle is strongly laid down and well explained, in the case of *Powell v. Hankey*, 2 P. Wms. 82. That case is of good authority, and is cited and relied on in a late treatise on the rights of married women, by *Cluney*, p. 168, 169. In the case of *The Trustees of the Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. R. 77, it was said by Chancellor KENT, that where the wife permits the husband to receive the rents of her separate estate, the most favourable presumption is made for the husband. And although the decree in that case was reversed in the Court of Errors, (17 Johns. 548,) yet it was upon grounds unconnected with the principle I have cited, to which no exception was taken. The presumption in favour of the husband is, of course, like all other presumptions, liable to be rebutted by facts which take off its force. But there is nothing in the present case to weaken it. The wife never complained to her trustee, or requested him to receive the rents. They were invested in goods, which went into a store, the profits of which increased the personal estate of the husband, to one half of which the wife was entitled in case of his intestacy; and very probably she might have expected that he would make a will and leave her much more than half. When the goods went into the store, they became so blended with the property of the husband, that it was impossible to distinguish them, nor has the appellant made any attempt to distinguish them, but accounted for the whole as the personal estate of the intestate. Under all these circumstances, I am of opinion that the claim of the appellant to the rents of her house, received by her husband, was not sustainable, and the Orphans' Court did right in rejecting it.

The second exception is to the striking out of a credit claimed by the appellant of the sum of one hundred and seventy-nine dollars and thirty-seven cents, paid for the funeral expenses of the deceased. The whole funeral expenses amounted to twice that sum, one half of which was struck out. As to this, I think the Orphans' Court was wrong. The deceased had a good estate, and no children, and the widow, who was entitled to one half, wished to be liberal in honour of his memory. A handsome tombstone was erected over a vault, in which the body was interred, and this was the principal article of expense. I think it should be allowed; but there was one article which should be rejected—I allude to a

(Case of the Appeal of Ann McGlinsey, Administratrix of John McGlinsey.)

picture of the deceased, painted after his death. If the widow desired a memorial of this kind, she should pay for it herself, and keep it for her own satisfaction. With that exception, I am for allowing the sum charged for funeral expenses.

On the whole, then, the decree of the Orphans' Court is to be affirmed, except as to the rejection of part of the funeral expenses. That part is to be reversed, and the whole charge for funeral expenses allowed to the appellant, except the cost of the picture.

[PHILADELPHIA, APRIL 10, 1826.]

CERTIORARI.

Case of the Division of MACUNGIE Township, in the County of Lehigh.

If the Court of Quarter Sessions, on a petition for the division of a township, under the act of the 24th of *March*, 1803, make an order appointing three men to make a plot or draught of the said township, and the division line proposed to be made, and from their return it does not appear that they made any inquiry into the expediency of granting the prayer of the petition, the proceedings are erroneous.

THE proceedings in this case were brought before this court by a *certiorari*; directed to the Court of Quarter Sessions of *Lehigh* county. By them it appeared, that a petition was presented by sundry inhabitants of *Macungie* township, setting forth that the township was too large, and praying the court "to appoint three impartial men, to make a plot or draught of the said township, and of the division line proposed to be made therein, agreeably to the provisions of the act of assembly in such case made and provided." And thereupon the court made an order, appointing three impartial men "*to make a plot or draught of the said township, and of the division line proposed to be made therein, agreeably to the provisions of the act of assembly, in such case made and provided,*" and to make a report of their proceedings therein to the next court. To this order, the three men appointed by the court made a return, in which, after setting forth that they had been appointed by the subjoined order of court, *to make a plot and division of the township of Macungie*, they reported, that in obedience to the said order, they had made a division of the said township as follows;—and then described the division, a draught or plot whereof was annexed to the said return. The concluding words of the report are, "*and this is our opinion.*" The act of assembly of the 24th of *March*, 1803, under which these proceedings were had, (4 *Sm. L.* 40,) directs the court, on a petition for the division of a township, to appoint three impartial men, if necessary, to inquire into the propriety of granting the prayer of the petition, and declares that

(Case of the division of Macungie township, in the county of Lehigh.)

it shall be the duty of those men, or any two of them, to make a plot or draught of the township, and the division line proposed to be made therein, which they, or any two of them, shall report to the next Court of Quarter Sessions, together with their opinion of the same; and at the court after that to which the report shall be so made, the court shall set aside, or confirm the same, as to them shall appear just and reasonable.

Porter, against the proceedings, contended that they were erroneous, because the viewers were only directed to make a plot of the proposed division of the township, and not to give their opinion whether the division was proper, which the act of assembly requires.

Kittera, contra, answered, that the petition was substantially agreeable to the act of assembly. It sets forth that the township is too large, and prays that three men may be appointed to make a plot.

The opinion of the court was delivered by

TILGHMAN, C. J. The objection to these proceedings is, that it does not appear that the men appointed by the court made any inquiry into the expediency of granting the prayer of the petition. On the contrary they seem to have taken for granted, as they well might, from the words of the order of the court, that their duty was to make a division without any previous inquiry; so that all they had to do, was to make the most convenient division; and I understand the concluding words of this report, "*and this is our opinion,*" to mean no more, than that the division they had made, illustrated by a draught or plot, was, in their opinion, the most convenient that could be made. But whether it was expedient to make any division, no opinion was given. This was an omission of great importance, which put the division of the township on a footing not warranted by the act of assembly; for the making of a division is one thing, and forming a judgment on the expediency of making such division, is another. If the order of court had been, to inquire, in the first place, whether any division was expedient, we know not what would have been the result. It is the opinion of the court, therefore, that the defect is fatal, and the proceedings should be quashed.

Proceedings quashed.

[PHILADELPHIA, APRIL 15, 1826.]

SMITH *against* The COMMONWEALTH.

IN ERROR.

This court will not in general proceed upon a writ of error, contrary to the agreement of the parties; but the rule is not applicable to the case of a judgment of imprisonment for life.

Unless it appear on the face of an indictment for burglary, *what judgment* was given on a former indictment for the same offence, it is error to sentence the defendant to imprisonment at hard labour during life. It is not enough if the indictment state that the defendant was *convicted* on the former indictment, and that the court gave *judgment*.

ON the return of a writ of error to the judges of the Court of Common Pleas, holding a Court of Oyer and Terminer for the city and county of *Philadelphia*, it appeared that the plaintiff in error, *John Smith*, was convicted of burglary at the *January* session of the Court of Oyer and Terminer, held in 1819, and sentenced to undergo an imprisonment for the term of seven years, one twelfth part of it in the solitary cells, the remainder at hard labour, to restore the property stolen, &c.

On the 5th of *December*, 1821, he was pardoned by the governor and released from prison.

At the *April* sessions of the Court of Oyer and Terminer, he was again indicted for burglary. The indictment set forth his former conviction, and that the court gave judgment, but did not set forth what the judgment was, or the pardon.

To the last indictment the defendant below, on the 5th of *May*, 1823, pleaded guilty, and, on the same day, was sentenced to pay a fine of one cent to the commonwealth, to restore the property stolen, and to undergo an imprisonment at hard labour during his natural life, &c.

An agreement was returned with the record, signed by the defendant below, after having pleaded guilty, but before he was sentenced, by which he agreed to waive all error so far as respected the sentence or judgment to be pronounced on the said indictment.

When the case was called up for argument in this court,—

Pettit, for the commonwealth, moved to quash the writ of error, because the plaintiff in error had agreed to waive it. A man cannot sue out a writ of error against his own agreement. *Baring v. Shippen*, 2 *Binn.* 169, *per* YEATES, J., and the authorities cited by him. The agreement was advantageous to the defendant below, because there were several other indictments against him, and he thought he had a better chance of pardon on one judgment than on several. The other prosecutions were dropped in consequence of this agreement.

A. Randall, for the plaintiff in error, denied that the agreement extended to the judgment on this indictment.

(Smith v. The Commonwealth.)

As to the case presented upon the record, he said that the defendant below had been sentenced to imprisonment for life, though it did not appear that he had been convicted and sentenced for burglary before. The indictment only set forth, that the court gave judgment on the former indictment, without saying what the judgment was.

Pettit, in reply. The indictment sets forth, that the defendant below was *convicted* on a former indictment, which is all the act of assembly requires. It also states, that the court gave judgment, which must be presumed to have been a legal judgment on a verdict of conviction.

The opinion of the court was delivered by

TILGHMAN C. J. This case comes before us on a writ of error to the Court of Oyer and Terminer for the county of *Philadelphia*. The error complained of, is that the defendant having been convicted of burglary, was sentenced to imprisonment in the penitentiary, at hard labour, &c. for life. The attorney for the commonwealth moved this court to quash the writ of error, because the defendant had made an agreement in writing, that he would not bring a writ of error. This court will not, in general, proceed upon writs of error, contrary to the agreement of the parties. But the rule is certainly not applicable to capital, criminal cases. What consideration can a man have received, adequate to imprisonment at hard labour for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement; yet the principle, in both cases, is the same. The motion to quash must therefore be rejected. But it was contended, on behalf of the commonwealth, that the judgment was good, because the defendant had been convicted of burglary once before. If this appeared on the face of the indictment, the judgment would have been good, because it is enacted by the act of the 22d of *April*, 1794, section 13, (3 *Sm. L.* 190,) "that if a man shall commit burglary a second time, and be thereof legally convicted, he shall be sentenced to undergo an imprisonment in the said jail and penitentiary house, at hard labour, during life," &c. But it does not appear in this indictment, what judgment was given on the former indictment. It is indeed set forth, that the defendant was *convicted* on a former indictment, and the court *gave judgment*. But what that judgment was, is not said. When the law speaks of *conviction*, it means a *judgment*, and not merely a *verdict*, which in common parlance is called a conviction. It is the opinion of the court, therefore, that it does not appear by this record that the defendant had been convicted of burglary before, and therefore the judgment of imprisonment, &c. during life, was erroneous, and should be reversed.

Judgment reversed.

[PHILADELPHIA, APRIL 10, 1826.]

SHRUNK *against* The President, Managers, and Company of
the SCHUYLKILL Navigation Company.

IN ERROR.

The rivers of *Pennsylvania* are not subject to the common law rule, that all fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the property of the soil, and consequently the right of fishing, *usque ad filum medium aquæ*, and the owners of the other side the rights of soil and fishing *ad filum aquæ* on the other side, and that he who owns both sides, is the owner of the whole river, and has the exclusive right of fishing according to the extent of his shores. The owner of land fronting upon the river *Schuykill*, above tide waters, who had the exclusive right of drawing seines on his own land, is not entitled to damages, under the act of the 8th of *March*, 1815, incorporating the President, Managers, and Company of the *Schuykill* Navigation Company, for an injury sustained in consequence of the erection of a dam across the river by the said company, by reason of which, shad, herring, and other fish were prevented from passing up the river.

THE plaintiff in error, *Godfrey Shrunk*, having instituted proceedings in the Court of Common Pleas of *Philadelphia* county against the defendants in error, under the act of assembly of the 8th of *March*, 1815, to recover damages for an alleged injury to his fishery in the river *Schuykill*, it was agreed that judgment be entered for the defendants, in the court below, that a writ of error be taken out, and that the following case be considered as a special verdict:

“The plaintiff, at the time when a dam was erected across the river *Schuykill*, by or under powers derived from the defendants, and for a long time before, was seized of one acre of land in the Northern Liberties, containing in front on the river *Schuykill*, at low water mark, seven perches and twenty-eight feet, prout deed from *Peter Robeson* and wife, *February* 5th, 1806, and also of six acres and sixty-three perches in the same township, containing in front on the same river, forty-nine perches and eight feet, prout deed from *John Wagner* and wife, *September* 19th, 1806, and memorandum of sale, *January* 4th, 1806.

“On these fronts on the river *Schuykill*, both he and the previous owners of the land had been, and, until the time of the erection of the dam complained of, were in the practice of drawing a fishing seine, and derived profit from taking fish by means thereof, and no person had a right to come upon the estate for that purpose without the license or consent of the said *Godfrey*, or the owner of the estate for the time being; and the antecedent owners of the last mentioned lot had at different times granted leases of the premises by the name of a fishery, viz. *Thomas Mifflin* to *Godfrey Shrunk* prout lease dated *January* 3d, 1797, and *John Wagner*, to the same, prout lease, dated *January* 1st, 1801. In like man-

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

ner other persons, the owners of estates in the neighbourhood of the plaintiff, bounded by the river *Schuylkill*, which estates were conveniently situated for drawing a fishing seine thereon, were in the same practice of either drawing the seine or letting out the use of their fronts for that purpose, under the name of a fishery, and derived a similar profit, and no person had a right to come upon their estates for that purpose without their license and consent, and particularly the Rev. *William Smith*, who owned land lower down the river, by lease dated *September 1st, 1800*, let the same to the plaintiff for a term of years, prout lease.

“The dam erected across the *Schuylkill*, as before mentioned, prevents the passage of shad, herring, and other fish commonly caught by the seine, up the river, and the plaintiff is no longer able to take fish therein by the seine.

“The question is, whether, under the act of incorporation of the President, Managers, and Company of the *Schuylkill* Navigation company, they are liable in damages to the plaintiff, by reason of thus preventing the passage of shad, herring, and other fish, as aforesaid, up the river *Schuylkill*.

“If the opinion of the court shall be in favour of the plaintiff in error, judgment to be reversed, and a *venire de novo* awarded.”

Rawle, and *Rawle, jun.*, for the plaintiff in error.

The question presented by the facts of this case is of the first impression, and important in its character and consequences. It is, whether the proprietor of land adjoining a river frequented by fish, who has been in the habit of deriving profit from the exclusive right to take fish from it on his own land, has such a property in the fishery as is susceptible of injury, within the meaning of the act of the 8th of *March, 1815*, (6 *Laws of Penn.* 257,) the tenth section of which provides, “that if any person or persons shall be injured by means of any dam or dams being erected, as hereinafter mentioned, or the land of any person inundated by the swelling of water, in consequence of the erecting of any dam or dams, or any mill or other water-works, injured by swelling the water into any tail race of any mill or other water-works, which may have been erected in the said river, or any stream of water emptying into the same; and if the president, managers, and company cannot agree with the owner or owners thereof on the compensation to be paid for such injury,” compensation shall be made in the mode provided by the act. At common law nothing is better settled, than that the owners of the banks of a river, like the *Schuylkill*, which, though a common highway, is not technically *navigable*, are owners *ad filum medium aquæ*, and have several fisheries opposite to their respective shores. This established doctrine of the common law has in one case, *Carson v. Blazer*, 2 *Binn.* 475, been considered inapplicable to the great rivers of *Pennsylvania*, which are *navigable* far beyond tide waters. The question, however, cannot be considered as so much at rest in

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

Pennsylvania, as not to be open to argument. The term, *navigable*, is technical, and applies only to those rivers which are arms of the sea, and denominated *royal rivers*; to determine the character of which, the ebb and flow of the tide are the only criterion. There are many rivers in *England*, which, though not so large as the *Delaware* and the *Susquehanna*, are in the popular and true sense of the term navigable; and others, which are even larger than many streams, which have been declared common highways in *Pennsylvania*. The *Thames* and the *Severn*, above tide waters, are the channels of at least as much commerce as the *Delaware* and the *Susquehanna*, and, as to size, are superior to the *Bald Eagle*, the *Conestoga*, the *Swatara*, and many others, to which the doctrine of several fishery is, according to the opposite argument, as inapplicable as to the larger rivers. The acts declaring these rivers public highways, and regulating the navigation and fisheries in them, do not interfere with the common law doctrine; for the *English* rivers, above tide waters, are in precisely the same situation. In all those streams which are *actually*, but not *technically* navigable, the public have an easement and no more. The private right of soil and fishery are subject to the public right of passage, and the government, for public purposes, exercises the right of regulating the navigation and fisheries. The view which the proprietaries entertained of this subject, is exemplified by their mode of appropriating islands. It was their custom to issue warrants for the survey of all islands, before they opened the land office to the public, the object of which must have been, to prevent those who became proprietors of the opposite shores, from becoming, as a necessary legal consequence, the proprietors of the islands. At common law, fresh water rivers belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the property of the soil, and, consequently, the right of fishing *usque ad filum aquæ*, and the owners of the other side, the right of soil or ownership and fishery unto the *filum aquæ* on their side; and, if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length; but these rivers, as well as those which flow and reflow, are under these two servitudes, viz. one of prerogative, belonging to the king, and another of public interest, or belonging to the people in general. *Harg. Law Tracts, De Jure Maris*, p. 1., ch. 1, 3. *Angell on Water Courses*, 15, 29. The right of the individual is subject to the right of the public, but is no further interfered with than public utility requires. This doctrine has been fully recognized in several of our sister states, whose rivers are of no less magnitude than those of *Pennsylvania*. *Palmer v. Mulligan*, 3 *Caines*, 307. *Shaw v. Crawford*, 10 *Johns*. 236. *People v. Platt*, 17 *Johns*. 195. *Hooker v. Cummings*, 20 *Johns*. 90. *Adams v. Pease*, 2 *Conn. Rep.* 481.

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

It is not necessary, however, that the title to the soil should be vested in the party claiming a several fishery. The soil may remain in the state, while a right to an exclusive fishery in the waters of a river belongs to an individual, and such right may be shown either by actual grant or by long continued usage. *Harg. Law Tracts, De Jure Maris, p. 1, ch. 1, 5. Co. Litt. 4, b. 122, a. (also note.) Angell, 9, (note.) Swift's Dig. 110.* The title of the plaintiff in error to the fishery in question, is proved by long and uninterrupted usage. It may be traced back by the papers, which form part of the case, to the year 1797,—a period long enough to give a title to land, and long enough to raise a presumption of a grant of the fishery. It is to be observed that length of time is not set up against the state, but against individuals who have obtained a grant of certain privileges, and who attempt to take the property of the plaintiff without compensation. It was formerly requisite that a usage, in order to give title, should amount to prescription; but it is now settled, that a much shorter period will be sufficient to give title to an incorporeal hereditament; and these periods are fixed by analogy to different statutes of limitations. Thus, in *England*, twenty, in *Pennsylvania*, twenty-one, and, in *Connecticut*, fifteen years will give title. *Angell, 42, 43. 2 Saund. 175, (note.) Cooper v. Smith, 9 Serg. & Rawle, 33. Strickler v. Todd, 10 Serg. & Rawle, 63. Ingraham v. Hutchinson, 2 Conn. Rep. 584.* Here there has been an undisturbed enjoyment of a fishery nearly thirty years, from which a grant ought to be presumed.

Independently of the common law doctrine, and of title to the soil of the river, or the fishery, the owners of the shores of our rivers, have, by well known custom, an exclusive right to fish to a reasonable distance opposite their shores. This custom is so notorious as to require no proof. It was considered by YEATES, J., in *Carson v. Blazer*, to be beyond all doubt. It is the common understanding of the country, and such fisheries are universally regarded as substantial property. They are the subjects of transfer by will and by deed, by the name of fisheries, and large prices are often given for them. A long continued course of legislation recognizes, not only a fixed, permanent, valuable interest, but an exclusive property in such fisheries, and many acts have been passed for the preservation of fish, with a view to the interest of those who owned the shores. In relation to the *Schuylkill*, the legislative recognition of individual right to fisheries, has been even more explicit and emphatic than in relation to other rivers. *Acts of the 14th of March, 1761, 1 Sm. L. 331, 9th of March, 1771, 1 Sm. L. 324, 14th of March, 1761, 1 Sm. L. 235, 9th of March, 1771, 1 Sm. L. 314, 24th of March, 1781, 28th of March, 1785, 2 Sm. L. 308, 9th of March, 1786, 2 Sm. L. 370, 11th of March, 1793, 3 Sm. L. 115, 2d of January, 1801, 3 Sm. L. 445, 8th of February, 1804, 4 Sm. L. 118, 16th of*

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

March, 1807, 4 Sm. L. 379, 1st of March, 1815, 6 Laws of Penn. (Reed's Ed.) 253, 27th of March, 1820, 7 Laws of Penn. (Reed's Ed.) 296. There is nothing in these acts regulating the fisheries and navigation in the rivers to which they relate, at all inconsistent with separate property in the fisheries. Government may regulate the use of them, but cannot destroy them, and this power has often been exercised in relation to other subjects, as well as this. The right of regulating navigation and fisheries, has always been exercised in *England*, where the owners of the adjoining shores are owners *usque ad filum aquæ*, and in those states in which this doctrine of the common law prevails. The regulation of the enjoyment of the right is not repugnant to its existence. Nor has the idea of distinct and exclusive property in the fisheries in our great rivers been confined to public opinion and the legislature. It has been adopted by this court in *Elliott v. Elliott*, 5 Binn. 12, and *Stoddart v. Smith*, *Id.* 363. The custom is a good one. It is as ancient as the settlement of *Pennsylvania*. It is general, for it pervades the whole state. It is reasonable, for it tends to public peace and convenience, by assigning an owner to what would otherwise be common and the source of strife. It does not conflict with the common law, but falls short of it. It is no objection to the custom that it has not the antiquity of an *English* custom. Such an objection would exclude all customs from *Pennsylvania*; yet a custom as to the way going crop was established in *Stultz v. Dickey*, 5 Binn. 285; and, as to the liability of carriers on the western waters, in *Gordon v. Little*, 8 Serg. & Rawle, 533.

If the plaintiff in error has, strictly, no title either to the bed of the river or to the fishery in its waters, he has that which gives him substantially an exclusive interest in it. He is the owner of the shore, and has an exclusive right to draw a seine upon it, which, in effect, is the same thing as owning the fishery. That he has such exclusive right, is not only perfectly clear from the nature of property itself, but has been decided by this court; (*Cooper v. Smith*, 9 Serg. & Rawle, 26,) recognized by numerous acts of assembly, and is conceded by the case stated. This, in substance, makes the fishery appurtenant to the land, and stamps an additional value upon it. There is nothing in principle to distinguish a several fishery, properly so called, from an exclusive right to fish on one's own ground. In neither case has the proprietor any interest in the fish before they are caught, but they have an equal interest in their passing up to the estate, which their presence renders valuable. One thing is very clear: the plaintiff has sustained an injury in his property; for his land, which, before the erection of the dam was worth many thousands of dollars, is now not worth as many hundreds. It cannot be denied, therefore, that he has been injured by the dam, and, if so, the tenth section of the act incorporating the defendants in error gives him a claim to com-

(*Shrunk v. The President, &c. of the Schuylkill Navigation Company.*)

pensation. On this subject, GIBSON, J., has laid down a safe rule in *Thoburn v. The Schuylkill Navigation Company*, 7 *Serg. & Rawle*, 420. The standard of damages, is the difference between what the property would sell for unaffected by the obstruction, and what it would sell for afterwards. A statute of *Massachusetts* gave a compensation where any one suffered *damage* by the erection of works similar to those of the defendants in error, which was held to extend to all kinds of injury, and to embrace the case of one whose passage up the river to his own property was interrupted. 2 *Pick.* 33.

Binney and Chauncey, for the defendants in error.

The question to be decided is, whether the defendants, by erecting their dam, have done an injury to the plaintiff, for which he is entitled to compensation under the act of the 8th of *March*, 1815? His right is founded wholly on his ownership of a strip of land on the margin of the *Schuylkill*, from which he derived profit by catching fish. In the case stated, there is no mention of a grant of fishery, nor of any right founded upon prescription, or the exercise of any exclusive fishery. The river is a public common, to which every citizen of *Pennsylvania* has an equal right. The ownership of the shore gives a facility of fishing, but nothing more.

We resist the claim of the plaintiff in error on the following grounds:

1. In the great rivers of *Pennsylvania* there is no private right of fishing.

2. The commonwealth has a right to destroy the fisheries without compensation.

3. She has so destroyed them, by the act of assembly in question.

1. The first point is settled by *Carson v. Blazer*. The common law recognizes no right of fishery, but from the ownership of the soil of the river. The king has the right to the soil of the sea, which is proved by his unquestioned right to the fisheries in it. *Harg. Law Tracts*, 11. The right of fishery may be separated from the right of soil, by grant from the owner of the soil. *Co. Litt.* 122, 123, (*note.*) Common of piscary is the liberty of fishing in another man's water. 2 *Bl Com.* 34, 39. The exclusive right of fishing in a public river is a royal franchise. This is called a free fishery, and relates to an arm of the sea. A several fishery is a different thing, and can only exist, (according to the opinion of some,) in the owner of the soil. At least, there can be no right which is not derived from the owner of the soil. Unless, therefore, the plaintiff in error has a right derived from the owner of the soil, he has no right. He has a mere liberty, like that of pasturing cattle on the waste lands of the commonwealth, or of shooting ducks on a point of land. Location near the water gives great advantages, but no property. The owner of the soil is the commonwealth. To apply the common law descrip-

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

tion of a navigable river to the great rivers of *Pennsylvania*, would be absurd, ruinous, and against all experience. The length to which *New York* has been compelled to go by the adoption of the common law principle, is shown by the case of *The People v. Platt*, 17 *Johns.* 195, in which it was held, that the owners of the shores of the *Saranac* might erect dams across the river; and the case of *Hooker v. Cummings*, 20 *Johns.* 90, which makes the islands the property of the owners of the opposite shores. Now, in *Pennsylvania*, no man ever thought of claiming an island in the *Susquehanna*, the *Delaware*, or the *Schuylkill*, without a special grant. These have always been the subjects of special grant. *Hunter v. Howard*, 10 *Serg. & Rawle*, 243. From the foundation of the province, the course of legislation and the uniform sense of the profession have been, that as to large rivers and creeks which are susceptible of navigation, the common law rule did not apply. By the charter of *Pennsylvania*, the fisheries were granted to *William Penn*, and neither he nor his successors have ever granted them to individuals. They have always exercised a control over them, which is inconsistent with the idea of private property. They have been treated as matters entirely under the control of government, and, consequently, in no law for raising county rates and levies, have fisheries been specified as objects of taxation. The commonwealth being the proprietors of all the fisheries, merely permits the people to fish, and the plaintiff in error having more advantages from situation than others; derived greater profit from a liberty which was common to all. If, as in the case of *Carson v. Blazer*, any person could have found a sand bank or other spot to draw a seine upon, he would have been at liberty to do so, unless restrained by the legislature. No private right could have prevented him.

2. The commonwealth having merely given permission to fish, and constantly exercised the right to enlarge or restrain that permission, according to its own pleasure, it follows that it had a right to resume it when it pleased; and in granting to the defendants in error the privilege of erecting dams, it interfered with no rights but its own.

3. The act of 1815 did not intend to give damages for such injuries as the plaintiff in error complains of. It intended to give damages to the owners of property, but the plaintiff in error had no property injured. The law has provided for several cases of injury by special terms, and if it had intended to give a compensation for damage to fisheries, it would certainly have said so. It was obvious that they would be greatly reduced in value. But the depreciation of the value of land was not contemplated as a subject of compensation. The rendering of the neighbouring grounds unhealthy, would be a more direct injury to their owners than stopping the passage of fish up the river, yet it would hardly be pretended that they could recover damages for such an injury.

(*Shrunk v. The President, &c. of the Schuylkill Navigation Company.*)

The law does not act with any injustice upon the plaintiff in error, and others in his situation, because the legislature have always held out the intention of making improvements in the *Schuylkill*, and all other interests have uniformly been made subordinate to navigation. Having purchased with full notice of what has happened, there is no ground of complaint. The case in 2 *Pickering*, 33, turned on an act of assembly of *Massachusetts*, very different from this. It was a privilege granted to a private company for a private purpose, and the plaintiff was deprived by the defendants of the use of a highway. In the case before us, the plaintiff had no right either to the fish or to the water; and, with equal propriety, might any one maintain an action, who, by the erection of the dam, is deprived of the opportunity of catching a shad above the falls.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an important cause, and was well argued. The facts appear in a case stated in the nature of a special verdict, and the question is, whether the plaintiff be entitled to recover damages against the defendants, under the provisions of the act of the 8th of *March*, 1815, by which the defendants were incorporated? The defendants, by virtue of powers vested in them by that act, concerning which there is no dispute, erected a dam across the river *Schuylkill*, by which the fish were prevented from running up, to the great injury, as the plaintiff alleges, of his fishery, appurtenant to his land, on the eastern bank of the river, above the ebbing and flowing of the tide. The plaintiff claimed the exclusive right of fishery, opposite to his own land, to the middle of the river, or at least the exclusive right of drawing a seine on his own land, and even under that restriction, he contends that his property has sustained an injury, for which he is entitled to compensation. In order to decide this question, it will be necessary to consider 1st, what the plaintiff's right of fishery really was, and 2d, whether his property has sustained such an injury as was intended to be compensated by the act of assembly.

1. The plaintiff contends, that the rivers of *Pennsylvania* are subject to the rule of the common law, that is, that all fresh water rivers, (by which is understood, rivers where the tide does not ebb and flow, and which are therefore said to be not navigable,) belong to the owners of the soil adjacent; so that the owners of one side have, of common right, the property of the soil, and consequently the right of fishing, *usque ad filum medium aquæ*, and the owners of the other side, the right of soil and fishing, unto the *filum aquæ* of their side; and if a man is owner of the land on both sides, he is owner of the of the whole river, and hath a right of fishing according to the extent of his land in length. This is the law laid down in *Harg. Law Tracts*, 5, for which he cites good authority. The right of fishing, in *England*, is founded

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

originally on the right of soil. The king has a right of property or ownership in the sea, and soil thereof, and in the arms and creeks of the sea; yet a subject may have such right by grant from the king, or by prescription which supposes a grant. (*Harg. Law Tracts*, 11, 17.) But the common law does not vest the right of soil or fishery, in the owners of land on the margin of navigable rivers, that is, rivers where the tide ebbs and flows. The great rivers of *America* are so different from those of *England*, that in the opinion of many, the same definition of a navigable river cannot properly be applied to both. Many of our rivers, such as the *Mississippi*, *Ohio*, *Alleghany* and *Susquehanna*, are navigable, even in their natural state by vessels of considerable burden, and whether if such rivers had existed in *England*, the rule of the common law might not have been different, may certainly admit of question. As to the extension of that law to the *American* rivers, the judges of different states have held different opinions. *Massachusetts*, *Connecticut*, and *New-York*, seem to be for the common law, if we are to judge from the cases of *The Boston and Roxbury Mill Corporation v. Gardner and another*, 2 *Pick. Rep.* 33, *Adams v. Pease*, 2 *Conn. Rep.* 481, *The People v. Platt and others*, 17 *Johns.* 195, and *Hooker v. Cummins*, 20 *Johns.* 90. On the contrary, *Pennsylvania* and *South Carolina*, think the rule of the common law inapplicable to their great rivers, as appears from the cases of *Carson v. Blazer*, 2 *Binn.* 475, and *Cates v. Wadlington*, 1 *M'Cord's Rep.* 580. Distinctions might be found between the cases decided in *Massachusetts*, *Connecticut*, and *New York*, and that now before us. But I am not disposed to enter minutely into these cases, or to combat the opinions of the learned judges of other states, since much depends on the customs which have prevailed, and the laws which have been enacted in each state. I consider it as settled in *Pennsylvania*, by the decision in *Carson v. Blazer*, that the owners of land on the banks of the *Susquehanna* and other principal rivers, have not an exclusive right to fish in the river immediately in front of their lands, but that the right to fisheries, in these rivers, is vested in the state, and open to all. It is unnecessary to enumerate at this time the rivers which may be called principal, but that name may be safely given to the *Ohio*, *Monongahela*, *Youhiogeny*, *Alleghany*, *Susquehanna*, and its north and west branches, *Juniata*, *Schuylkill*, *Lehigh*, and *Delaware*. There is one decisive reason against extending the common law to *Pennsylvania*, and that is, that the right of fishing in *England* flows from the right of soil. Now, with us, it never has been supposed, from the earliest times to the present moment, that the owners of land on the bank had the right of property in the soil, to the middle of the river in front of their land; because, if they had, they would have a right to the islands also, contrary to universal opinion and practice. These islands have never been open to appli-

(*Shrunk v. The President, &c. of the Schuylkill Navigation Company.*)

cants under the common terms of office, either under the proprietary or state government, but have always been sold on special contract, and for higher prices than common; whereas the lands on the banks of rivers have always been open to the public on the usual terms and at the usual prices. For a particular account of the manner in which islands have been granted, I refer to the case of *Hunter v. Howard*, 10 *Serg. & Rawle*, 243. It is worthy of observation, also, that the proprietaries of *Pennsylvania*, and after them the commonwealth, which succeeded to their estate, exercised the right of granting licenses to keep ferries over rivers. Acts of assembly granting these licenses, with respect to the *Susquehanna*, *Mononguhela*, *Youghiogeny*, *Ohio*, *Schuylkill*, and *Juniata*, will be found in 2 *Sm. L.* 81, 89, 232, 243, 269, 412; 3 *Sm. L.* 270, 258; 4 *Sm. L.* 359, 484, 516. As for the soil over which our great rivers flow, it has never been granted to any one, either by *William Penn*, or his successors, or the state government. Care seems to have been taken, from the beginning, to preserve the waters for public uses, both of fishery and navigation; and the wisdom of that policy is now more striking than ever, from the great improvements in navigation already made and others in contemplation, to effect which it is often necessary to obstruct the flow of the water in some places, and in others to divert its course. It is true, that the state would have had a right to do these things, for the public benefit, even if the rivers had been private property; but then compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated, or at least checked these noble undertakings. When the case of *Carson v. Blazer* was first decided, some persons apprehended scenes of confusion, from throwing open the right of fishery. But, on the contrary, peace and good order, to a degree unknown before, have been the consequences, and the decision has given general satisfaction.

The counsel on both sides have relied on several acts of assembly which have been made, respecting the navigation and fisheries of the *Schuylkill*. The material parts of these acts I will briefly notice. On the 14th of *March*, 1761, 1 *Sm. L.* 235, an act was passed, the object of which was, to render the *Schuylkill* navigable. For this purpose commissioners were appointed, and vested with extensive powers. They were authorized to erect dams, pens for water locks, or any other works whatever, which they might think most fit and convenient, to answer the purposes of improving the navigation, also to make towing-paths, &c. The same act prohibits the erection, by individuals, of any weirs, racks, fishing-dams, pounds, or other devices, by which the fish may be obstructed in their passage up the river,—provided, that this shall not be construed so as to affect the right before given to the commissioners, to erect dams, &c. Considering the whole of this act, it would seem, that the legislature supposed they had

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

a right to injure the fisheries to what extent they pleased, for the purpose of improving the navigation of the river, without making compensation to the owners of lands contiguous to it, because it is evident that the construction of dams and locks was in contemplation, which must necessarily obstruct the passage of fish upwards. By the act of the 9th of *March*, 1771, 1 *Sm. L.* 314, it was enacted, that a seine should be drawn only once, in any one pool or fishing place, from twelve o'clock at noon of one day to the same hour of the next day, in order that the inhabitants in the upper part of the *Schuylkill*, might not be deprived of a reasonable proportion of fish. *But every person might fish with a hoop-net.* This general permission to fish with hoop-nets, negatives the exclusive right of those persons who owned the lands adjacent to the river. But the acts of the 9th of *March*, 1786, 2 *Sm. L.* 370, and the 11th of *April*, 1793, 3 *Sm. L.* 115, speak of the *proprietors of fisheries*, and the *owners of fishing places or parts used as fisheries*. And by these expressions, it was argued by the counsel for the plaintiff, the right to fisheries was recognized. The right to fisheries certainly was recognized, but it remains to be inquired what was meant by a *fishery*. And I apprehend that by a *fishery*, was understood the exclusive right which every owner of land on the margin of the river has, to use his own property for the purpose of drawing a seine, or practising any other device for the catching of fish. This exclusive right gave the proprietors of these lands such great advantages, that it was hardly worth while for any other persons to attempt to fish with seines. The right of property on the front of the river was valuable, therefore; it was called a *fishery*, and some spots remarkably favourable might be rented for considerable sums annually. Nevertheless, as the entire right to the soil and water of the river remained vested in the state, for the benefit of the public, the owners of the adjoining lands could not complain that their property was invaded, if, for the purpose of improving the navigation (of infinitely more importance than fisheries,) such works were erected under sanction of law, as obstructed the passage of fish. But as the value of these lands would be lessened by the erection of such works, although the public, in strict justice, might not be bound to make compensation, yet it might perhaps be thought reasonable by the legislature to make it. The act of assembly under which the defendants erected the dam, which prevented the fish from passing up as high as the land of the plaintiff, has directed compensation to be made in certain cases, and whether the plaintiff can bring himself within either of these cases, is, I think, the only question in this cause. Let us examine this act, then, on which every thing depends, after premising, that there is no reason why the court should be inclined to depart from the common meaning of words, in order to introduce what is sometimes called a liberal construction in favour of one party or the other. The plaintiff may think

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

it hard if his land should be deteriorated in value, without receiving compensation; and the defendants would surely have cause to complain of hardship, if after engaging in an enterprize of immense importance to the public, and great hazard to themselves, they should, by a forced construction, be involved in damages to an unknown amount, not contemplated when they accepted their charter. In the 9th section of the act, (6 *State Laws*, 258,) authority is given to the defendants, "their superintendants, surveyors, engineers, artists, and workmen, to enter upon the said river *Schuylkill*, to open, enlarge, or deepen the same, in any part thereof which shall appear to them most convenient, for opening, changing, making anew, or improving the channel, and also to cut, break, remove, and take away all trees, rocks, stones, earth, ground, sand, or other material, or any obstruction or impediment whatever within the said river, and to use all such timber, rocks, stones, gravel, earth, or other material in the construction of their necessary works, and to form, make, erect, and set up any dams, locks, or any other device whatsoever which they shall think most fit and convenient to make a complete slackwater navigation," &c. And by the 10th section, which bears most immediately on the case, "if any person or persons *shall be injured* by means of any dam or dams being erected, *as hereinafter mentioned*, or the land of any person inundated by swelling of the water, in consequence of the erecting of any dam or dams, or any mill or other water works injured by swelling the water into any tail race of any mill or other water works, which may have been erected in said river, or any stream of water emptying into the same; and if the president, managers, and company cannot agree with the owner or owners thereof, on the compensation to be paid for such injury, the same proceedings shall be had as is directed in the 11th section of the act," &c. The 11th section authorizes the defendants to enter upon and occupy all land which shall be necessary and suitable for erecting of any lock, sluice, or canal, and directs the manner of ascertaining the compensation for the damages, in case the parties cannot agree on it. The 13th section authorizes the defendants to enter upon any land contiguous and near to the river, and take and carry away any stone, ground, sand, or earth, making amends for any damages that may be done, and directing the manner of ascertaining the damages, if the parties cannot agree on the amount. These are the only parts of the act necessary to be taken into consideration. The expressions of the 10th section are remarkable,—“if any person shall be injured by means of any dam being erected, *as hereinafter mentioned*.” One would suppose at first, that the words, *as hereinafter mentioned*, referred to *dams*; but it appears that there is no mention afterwards of the erection of dams; the power to erect them having been previously given in the 9th section. So that, in strictness, the words *as hereinafter mentioned* have nothing to refer to, but

(Shrunk v. The President, &c. of the Schuylkill Navigation Company.)

the *injury done by means of the dams*. The different kinds of injury arising from dams are afterwards mentioned, and if this be the true construction, all injuries to fisheries are out of the question, because no mention is made of them. I should be loth, however, to rest my opinion on this law on such a criterion. I choose rather to collect the intention of the legislature from a more enlarged view of the subject. And, first, as different kinds of injury arising from dams, are specified, it is extraordinary that fisheries should not have been mentioned, if intended to be included; because it could not have escaped the attention of the legislature, that all lands suitable for drawing a seine, would be rendered less valuable, when fish should cease to ascend the river. The next observation that arises, is, that all the injuries mentioned in the act, are those which are done to property *immediately*,—such as the inundation of land, the swelling of the water into the tail races of mills or other water works, the carrying of a canal or lock through a man's land, or the taking away of ground, earth, stone, or other material. These are palpable and direct, so that there can be no dispute about the injury, though there may, as to the *quantum*. This is the line, then, which seems to have been marked by the legislature. Compensation shall be made for all damage arising from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum sine injuria*. And, upon reflection, we shall find that this was a wise restriction. There would be no end to damages for injuries considered in the most extensive sense of the word. For not only may the owners of land contiguous to the river, complain of injury by the obstruction to the ascent of fish, but also all other persons living in towns or lands *near* the river. All these persons feel the loss of fish. They either cannot get them at all, or must pay a higher price for them. All persons accustomed to fish with an angle, or a hoop net, may truly say they are injured. There are other kinds of injury too, sustained, particularly by the owners of lands on the river, between the *Fairmount* dam and the *Lower Falls*. All these persons have lost the benefit of navigation free from toll, in batteaus, flats, &c. which was very useful, as it served for carrying produce to market, and bringing up manure for their lands. Yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dams. Is compensation to be made for this, the greatest of all injuries? I presume not. Where, then, are we to stop, or what is to be the boundary, if we go beyond the line which I have mentioned? I confess I should be at a loss to fix any other. The plaintiff retains the complete ownership of his land, and the exclusive right of using it for the purpose of a fishery. There will still be fish, which remain all the year in the river, though the ascent of those from the sea is stopped. The value of his land is lessened, and

(*Shrunk v. The President, &c. of the Schuylkill Navigation Company.*)

that is his misfortune. But it is lessened by an accidental circumstance. No property has been taken from him. He had no property either in the fish, or the river. And he was bound to know the law, by which the river remained public property, and of course all emoluments from fisheries were precarious. Upon full consideration, it is the unanimous opinion of this court, our brother GIBSON included, who is now absent, that the plaintiff has suffered no injury intended to be compensated by the act of assembly, and therefore the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

[PHILADELPHIA, APRIL 15, 1826.]

STEELE against THOMPSON.

IN ERROR.

Testator devised as follows: "As touching all my worldly substance with which it has pleased God in this life to bless me, I give, bequeath, and dispose of the same as follows: *I make over* and bequeath to my son *George*, the plantation I now live on, *which hath two deeds.*" He then gave and bequeathed to his son *John* another plantation, and a third to two of his daughters, and to his other daughters he gave money legacies. The personal estate he directed to be kept together, to maintain and school the children, as formerly, till *George* came of age, when it was to be divided into three parts, one of which was to go to his wife, and the other two to his two sons, *George* and *John*. And after *George* came of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow. *Held*, that *George* took only an estate for life.

The acknowledgment of a deed by a feme covert is not good, unless it be expressed in the certificate of the magistrate who took her acknowledgment, that the contents of the deed were made known to her.

WRIT of error to the Court of Common Pleas of *Chester* county, in an action of ejectment brought by *Ruth Thompson*, the defendant in error, against the plaintiff in error, *John D. Steele*, to recover four hundred and ten acres of land in *West Bradford* township, which the plaintiff below claimed as one of the children and heirs at law of *George Liggett* the elder, who, being seized of the premises in question, by his will, dated *October 1st, 1758*, devised the same to *George Liggett* the younger, by the following words: "And, as touching my worldly substance, with which it hath pleased God in this life to bless me, I give, bequeath, and dispose of the same in the following manner, that is to say, *I make over and bequeath to my son George Liggett the plantation I now live on, which hath two deeds.*" He then devises as follows: "Also, I give and bequeath to my son *John* the plantation in *East Nantmill* township in the aforesaid county; also, I leave my daughters, *Rachael* and *Margaret*, the plantation in *East Fallowfield* township, the county aforesaid." To his daughters, *Mary*,

(Steele v. Thompson.)

Ruth, Ann, and Rebecca, he then gives legacies of fifty pounds each, to be paid when they respectively come of age; and also fifty pounds to his daughter, *Elizabeth M'Kinley*, and ten pounds to his grandson, *George M'Kinley*, to be paid when he is of age. The *personal* estate was directed to be kept together to maintain and school the children, as formerly, until *George* should come of age, and then divided into three parts, one of which was given to the testator's wife, one to his son *George*, and one to his son *John*; but if it should amount to more than fifty pounds each, the overplus was to go as directed by the will. After *George* came of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow.

George Liggett the elder died, leaving several children, of whom the defendant in error, who intermarried with *John Thompson*, since deceased, was one.

By a release, bearing date the 25th of *January*, 1772, the defendant in error, together with her husband and several other heirs of *George Liggett* the elder, relinquished all claim to the premises in question to *George Liggett* the younger. This release was acknowledged on the 2d of *April*, 1774, the defendant then being a feme covert, before *William Clingan*, esquire, a justice of the peace, who certified, "that the above named *Joseph M'Kinley* and *Elizabeth* his wife, *James Gondie* and *Rachael* his wife, *James Caldwell*, and *Mary* his wife, *John Thompson* and *Ruth* his wife, *Anna Stanett*, and *John Liggett*, did acknowledge the above written instrument of writing to be their act and deed, and desired the same might be recorded, the said *Rachael, Elizabeth, Mary*, and *Ruth* being of full age, and by me privately and apart examined, did say; that they and each and every of them did execute the same of their own free will and accord, without any compulsion whatsoever."

The plaintiff in error held under a title derived from *George Liggett* the younger, who died before the action was brought. On the trial in the court below, he contended, first, That by the will of *George Liggett* the elder, an estate in *fee simple* passed to *George Liggett* the younger; and, secondly, That the certificate of the acknowledgment of the release by the defendant in error, was sufficient to divest her interest as a feme covert, under the act of assembly.

The court having charged against him on both points, the jury found a verdict for the plaintiff below, for one ninth part of the premises. The defendant below, having excepted to the opinion of the court on both points, sued out a writ of error.

Dillingham and *Rawle*, for the plaintiff in error.

1. If the will of *George Liggett* the elder be construed as passing an estate for life only to *George* the younger, it is a case of extreme hardship to the plaintiff in error, who has paid a valuable consideration, made valuable improvements, and held the land

(Steele v. Thompson.)

thirty years. But there is enough in the will to show that the intention of the testator clearly was to give a fee simple, and that intention must govern, if not contrary to any rule of law. It is the will of a father of a family, made in his last illness, written probably by himself, a very illiterate man. He first declares his intention to dispose of all *his worldly substance*, which is equivalent to a declaration of an intent to dispose of his *whole estate*, words which have more weight in devises by a father to his children than in other cases. *Caldwell v. Ferguson*, 2 *Yeates*, 380. *Worldly substance* is the same as *property*, and property means *estate*. *Rosetter v. Simmons*, 6 *Serg. & Rawle*, 456. That the introductory words alone would give a fee is not contended, but here there is much more. The words "*make over*" signify more than bequeath, and imply the whole of the testator's interest. And when he *makes over* the plantation, "*which hath two deeds*," he evidently intended to give all the estate conveyed by those two deeds. These words are not descriptive, but refer to the quantity of interest. The locality of the devise had been previously fixed by the words, "the plantation I now live on." Words of inheritance are not necessary in a will to pass a fee. "All my real and personal property" are sufficient for that purpose. *Morrison v. Semple*, 6 *Binn.* 97. A devise of *an improvement* gives a fee. *Anonymous*, 3 *Dall.* 477. So, "all the remainder and residue of all the effects, both real and personal, of which I shall die possessed." *Hogan v. Jackson*, *Cowp.* 299. The words, "My property, after my debts are paid, I give and bequeath to my beloved wife," pass a fee simple. *Jackson v. Housel*, 17 *Johns.* 281. See also, 6 *Cruise*, 260. *Jackson v. Merrill*, 6 *Johns.* 185, note, (2d Edit.) *Cardwell v. Ferguson*, 2 *Yeates*, 380. *Frogmorton v. Halliday*, 3 *Burr.* 1618. *Bailis v. Gale*, 2 *Ves.* 48. *Cas. Temp. Talb.* 157. *Moore*, 873. *French v. M'Ilhenny*, 2 *Binn.* 13. *Clayton v. Clayton*, 3 *Binn.* 476. *Cassell v. Cook*, 8 *Serg. & Rawle*, 288. *M'Williams v. Martin*, 12 *Serg. & Rawle*, 269. Other parts of the will show an intent to give a fee. The testator provides for all his other children, and evidently did not mean to make an inadequate provision for *George*, which would be the case if he took only an estate for life. The personal estate is to be kept together to maintain and school the children, as formerly, until *George* comes of age; that is, they are to be kept on *George's* estate. There is a devise, too, to the testator's wife, of part of the dwelling-house, expressly *during widowhood*, which brings it within that class of cases which go to establish the position, that where A. devises land to B. *for life*, and *the rest of all his lands* to C., a remainder in fee passes to C. *Alleyn.* 28. *Cooke v. Gerrard*, 1 *Lev.* 212. *Wilson v. Robinson*, 2 *Lev.* 91. 2 *Vent.* 285. *Cro. Eliz.* 524. *Hope v. Taylor*, 1 *Burr.* 268. This view of the will is strengthened by the circumstance, that there is no residuary devise of the land.

(Steele v. Thompson.)

2. The certificate of the acknowledgment of the release, contains enough to divest the defendant in error of her estate. The precise point in which it is supposed to be defective, viz. in omitting to state that "the contents of the deed were made known to her," has never been expressly decided, though there have been *dicta* on the subject. In *M'Intyre v. Ward*, 5 Binn. 296, the Chief Justice expressly reserves his opinion on this question. It is the duty of the justice to make known the contents of the deed, and it should be presumed he did his duty. The certificate states, that she acknowledged she had executed the *above instrument*, which amounts to an acknowledgment that she knew its contents. *Davy v. Turner*, 1 Dall. 11. *Act of the 24th of February, 1770*. *Purd. Dig.* 117. *Watson v. Bailey*, 1 Binn. 470. *Shaller v. Brand*, 6 Binn. 435. *Evans v. The Commonwealth*, 4 Serg. & Rawle, 272. *Watson v. Mercer*, 6 Serg. & Rawle, 49. *Fowler v. M'Clurg*, *Id.* 143. *Jourdan v. Jourdan*, 9 Serg. & Rawle, 268. *Talbot v. Simpson*, 1 Peters, 190. *Kirk v. Dean*, 2 Binn. 341. 3 *Am. Dig.* 321, pl. 104, 105. 2 *Hurr. & M'Hen.* 38. *Jackson v. Gumaer*, 2 Cowen, 552.

Edwards, for the defendant in error.

1. The intent of the testator must be drawn from his language, and unless he has used words sufficient to convey the inheritance, *George Liggett* took only an estate for life. The law will not disinherit the heir without apt words. Devise to testator's wife for life, and immediately after her decease to his son *Paul*, *all his land at A.*, and five shillings to his heir at law and other children; *Paul* takes an estate for life only. *Roe v. Bolton*, 2 *Bl. Rep.* 1045. A devise to one without words of limitation, is to be construed a life estate only, unless it clearly appears from other parts of the will that more was intended. *Bowes v. Blackett*, *Cowp.* 235. An introductory clause, "as touching the disposition of all my worldly estate," is not sufficient to give a fee where the devise is in general terms, without words of limitation. *Frogmorton v. Wright*, 2 *Bl. Rep.* 889. *Busby v. Busby*, 1 *Dall.* 226. There is nothing in the words "*make over*," used in this devise, to enlarge it to a fee. In subsequent devises to other children, to whom he certainly intended to give the same quantity of estate, the testator in one instance uses the word *bequeath*, and in another *leave*. Neither is there any thing in the words, "which hath two deeds," for they are purely words of *description*.

2. Whether the acknowledgment was good, depends on the act of the 24th of *February, 1770*. It does not appear that the husband was not present at the examination. The expressions of the certificate are, "*in private and apart*." Nor does it appear that the contents of the deed were made known to the defendant in error. This court has repeatedly decided, as appears from the cases cited on the opposite side, that it must appear on the face of the certificate, that all the directions of the act of assembly have been complied with.

(Steele v. Thompson.)

TILGHMAN, C. J. The principal point in this cause arises on the will of *George Liggett* the elder, deceased, and the question is, whether an estate in fee, or for life only, passed by the devise to *George Liggett*, junior, son of the testator. The will begins with the usual introductory words, "As touching my worldly substance with which it hath pleased God in this life to bless me, I give, bequeath, and dispose of the same in the following manner." Then comes the devise to the testator's son *George*, in the following words,—“ I make over and bequeath to my son *George Liggett*, the plantation I now live on, which hath two deeds.” Immediately after this are the following devises: “ Also, I give and bequeath to my son *John*, the plantation in *East Nantmill* township, in the aforesaid county; also, I leave my daughters, *Rachael* and *Margaret*, the plantation in *East Fallowfield* township, in the aforesaid county.” Legacies of fifty pounds a-piece are then given to the testator's daughters, *Mary*, *Ann*, *Ruth*, and *Rebecca*, to be paid when they respectively come of age, and also fifty pounds to his daughter *Elizabeth M'Kinley*, and ten pounds to his grandson *George M'Kinley*, to be paid when he is of age. The *personal* estate is directed to be kept together to maintain and school the children, as formerly, until *George* comes of age, and then divided in three parts,—one to the testator's wife *Elizabeth*, one to his son *George*, and one to his son *John*; but if it amounts to more than fifty pounds a-piece, then the overplus to go as directed by the will. And after *George* came of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow. These are all the parts of the will which can throw any light on the devise to *George*, the son.

I have considered this case with a strong inclination to give an estate in fee, to *George* and the other devisees of the real estate, but I have not been able to find enough to justify the construction I wished to adopt. I agree that the construction is to be governed by the will of the testator, where it plainly appears; but then, it must appear from the words of the will, and not from conjecture. I take the rule to be, that where a devise is made in words, from which the law implies an estate for life, and no words of limitation are added, the devisee can take only an estate for life. But as no technical words are necessary to show an intent to give a fee, any words which show such intent are sufficient. If, for instance, the testator should say, I give to such a one *an estate in fee simple*, or *for ever*, a fee simple would pass. So, where the words show an intent to give the *whole estate*, or the *whole property*. In *Hogan v. Jackson*, Cowp. 299, the devise was, of “all the remainder and residue of all the effects, both real and personal, of which I shall die possessed.” Held, that the devisee took a fee. In *Morrison v. Semple*, 6 Binn. 94, a devise of *all the testator's real and personal property*, was construed a fee. The same construction was put on the word *property* by the Supreme Court of

(Steele v. Thompson.)

New York, in *Jackson v. Housel*, 17 *Johns.* 281. So, a devise of “an improvement,” has been held to pass a fee in *Pennsylvania*, 1 *Dall.* 477,) because, by an *improvement* is understood all the right which a man has to land, by virtue of an improvement made on it. In all these cases, the words indicating a fee simple were applied directly to the devise itself, and left no room for conjecture. The intent was plain, to give the testator’s whole interest in the land devised. The same intent appears in a devise of *all one’s lands of inheritance*. *Whitlock v. Harding*, *Moo.* 873, or in a devise of *all the estate I bought of A.* *Bailes v. Gale*, 2 *Ves.* 48. But where the words are only descriptive of the *situation* of the land devised, and not indicative of the *quantity of estate* intended to be given, a fee simple will not pass, because no intent appears to give such an estate. “*I devise all my estate at such a place*”—this carries a fee. *Ibbotson v. Beckwith*, *Cas. Temp. Talb.* 157. But, “*I devise all my land, at such a place*,” gives only an estate for life. Where no words of limitation are added to a devise for life, the case cannot be helped by conjectures founded upon other parts of the will, not applicable to the devise in question, from which it might seem probable that he intended to give a fee. As, where there was a devise of ten shillings to the heir at law, this was not thought sufficient to increase a devise, without words of limitation in a preceding part of the will, to an estate of inheritance. That the intent was, to give an inheritance, was highly *probable*; but something more was necessary: there were no words which gave the inheritance to any other person, and therefore it descended to the heir. There have been various opinions concerning the inferences which may be drawn from the introduction of a will, where it expresses an intent to dispose of the whole estate. In connexion with other circumstances, such an introduction may be worthy of consideration, but the better opinion seems to be, that there is not much in it, because it is generally considered by the drawer of the will as matter of form, and put down of course, before he begins to express the will of the testator; and because it cannot be doubted, that most men when they make their wills, do intend to dispose of their whole estate, whether they say so or not. I am sensible, that in some courts, there has been a pretty strong current in favour of construing a devise to be a fee, without words of limitation, from a supposition, that such was the intent of the testator. I believe, that in truth, such often is the intent—but I object to conclusions founded on *mere conjecture*; because they render the law uncertain, and leave too much to the humour of the judge, and I think I am supported in my objection, by the opinion which has generally prevailed in this state. We seem to have been more steady in our notions on this point, than some of our neighbours, and to have thought it prudent to adhere to the law, as we had it from *England*, at the time of our revolution. *Roe v. Blac-*

(Steele v. Thompson.)

kett, 1 Cowp. 235, was decided in 1775, the year before our declaration of independence; and there the opinion delivered by Lord MANSFIELD was, "that in order to make a devise of lands, without any limitation, a fee, such an intention *must appear* as to satisfy the conscience of the court, in presuming it. If it is *only problematical*, the rule of law must take place." And in *Frogmorton v. Wright*, decided in 1773, 2 W. Bl. 889, where the will had the introductory words, "as touching the disposition of all my temporal estate, &c." after which the testator made a devise to his nephew A. of "two houses, with a croft and appurtenances," it was held that he took but for life. And DE GREY, C. J., thus expressed himself: "Though the *probable* intent of the testator was an *absolute disposition*, yet it is not a *certain intent*, nor is it a *legal disposition*. There is no case where the introduction of the will only, has been held to give a fee, and though sometimes the devise of *an estate* may carry a fee simple, yet a devise of a house will not do it." I am aware that in the case of *French v. McIlhenny*, 2 Binn. 13, this court departed from what I suppose to be the true rule of construction. But the court was not unanimous in its opinion. And certainly the authority of that case was much shaken by the judgment in *Clayton v. Clayton*, 3 Binn. 476. Indeed, it appears plainly by the opinion of Judge BRACKENRIDGE, in the latter case, that while he himself adhered to *French v. McIlhenny*, he considered Judge YEATES as giving it up. As *Clayton v. Clayton* has a strong bearing on the case before us, I will give the words of the devise. "I give and bequeath unto *Sarah Evans*, wife of *James Evans*, and granddaughter of my sister *Margaret Jones*, and to her children, the plantation they now live upon, being the same that I bought of *Joseph Jones*, containing one hundred and seventy-five acres, for the use of her the said *Sarah Evans* during her life, and immediately after her decease, to be equally divided among the surviving children of her the said *Sarah Evans*." Here, certainly, was a strong *probability*, from the circumstance of the children taking nothing until the death of their mother, and then having the estate divided among them, that a fee simple was intended for them. Yet, as the intent was not certain, and did not appear from the words of the will, it was held that they took but for life. To examine all the cases on this subject reported in the *English* and *American* books, would be a task both endless and useless; for it cannot be denied, that they are not to be reconciled. I have cited such as I think to be of good authority, and sufficient to support the rule of construction applicable to the case before us, and will now make some remarks on the will of *George Liggett*, in order to see whether an intent to give a fee is sufficiently manifest, notwithstanding the want of words of limitation. As to the introductory words, having already fully expressed my sentiments of their value, I have nothing to add on that head. Next are to be

(Steele v. Thompson.)

considered some words in the devise to *George*, which the counsel for the defendant thought to be important, though they have not struck me as so. I allude to the words, "*I make over and bequeath.*" Now, it is clear enough that these words are used as synonymous; because the testator had no intention of *making over*, otherwise than by his will, nor have we any warrant for saying, that a more extensive meaning should be given to the words *make over*, than the word *bequeath*. Nay, more, it is evident that a more extensive meaning was not intended, because, in the devises immediately following, to his son *John*, and daughters *Rachael* and *Margaret*, the words *make over* are omitted. The expressions are, "*I bequeath to my son John,*" and, "*I leave to my daughters Rachael and Margaret.*" But it cannot seriously be supposed that the testator intended one kind of estate for *George*, and another for *John*, *Rachael*, and *Margaret*. Something was said of an implication arising from the testator's describing the plantation devised to *George*, as having *two deeds*. But this is mere matter of description, for the purpose of identifying this plantation, and distinguishing it from the other lands of the testator. It would be forcing the words from their natural meaning, to construe them as giving the whole quantity of estate conveyed by these deeds. Stress was laid, also, on that part of the will, by which it is ordered, that after *George* comes of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow. If this provision was inconsistent with the devise of a life estate to *George*, I grant that it would show an intent to give him an inheritance. As where land, having been devised to one without words of limitation, the devisee is afterwards ordered to pay a gross sum to another; there would be an inconsistency if the devisee took less than an estate of inheritance, because, otherwise, it might happen that he would be a loser by the devise. But I see no inconsistency between a life estate to *George* and this privilege granted to the widow; because she would enjoy it after *George's* death, even though he took but an estate for life. The intent of the testator was, that the family should be kept together, and the personal estate preserved for their use, till *George* came of age, and then things were to be put on a different footing. *George* being of age, could take possession of his estate, the personal property was to be divided, and the widow to have such apartments in *George's* house as she chose, for her residence. And all this might very well be, and yet *George* take no more than a life estate. I am of opinion, therefore, that he took but for life, the immediate devise to him giving him no more, and no plain intent to give an inheritance being expressed, or fairly deducible from any other part of the will. I have been induced, in consequence of a difference in opinion which I regret, to say much more on the subject of this devise, than I should otherwise have thought necessary, or even proper.

(Steele v. Thompson.)

Another point which arose on the trial of this cause, in the Court of Common Pleas, was, whether the acknowledgment of a deed by a feme covert be good, unless it be expressed in the certificate of the magistrate who took her acknowledgment, that the contents of the deed were known to her. In delivering my opinion in *McIntire v. Ward*, 5 Binn. 296, I desired it to be understood, that I did not consider this question as having been decided in *Watson v. Bailey*. But the acknowledgments of femes covert have frequently been brought before the court since, and I take the principle to have been established, that it must appear on the face of the certificate that the directions of the act of assembly have been substantially complied with. Now, the act directs that the magistrate shall read to the wife, or otherwise make known to her the full contents of the deed. If he had certified that the contents *were known to her*, without saying expressly that they were made known by him, it would have been sufficient; because the fair presumption would have been, that he had informed her of the contents. But, in the certificate before us, no mention whatever is made of the contents of the deed being known to the feme covert. The part omitted was material, and therefore I am of opinion that the acknowledgment was bad.

It is proper to add, that Judge GIBSON, who is not present, concurs in the opinion I have just delivered, on both points.

The judgment of the Court of Common Pleas is to be affirmed.

DUNCAN, J. In order to ascertain the intention of this testator, every expression is to be considered, circumstances twisted together, and the sense of every word weighed in the sense he has used it. We are not fettered, nor our understandings chained down by any rigid rules of technical limitation. It is simply an inquiry,—what did the man intend by the devise of his plantation to his son *George*? Did he mean to devise to him a life estate, or to give him the same interest he had in it, to be enjoyed by him under all the circumstances he had enjoyed it himself? Which of these constructions will best effectuate every provision intended by the testator? If he intended a fee simple, has he made known that intention plainly, either by express words, or words tantamount, words from which it can be conscientiously inferred he intended a fee? I mean, by inference, a manifest one. Or has he done so by necessary implication, not by a conjectural imagination, but plain, manifest intention? For if the intention of the testator is to ride over, and control the legal operation of his own words, it must be manifest and clear, not doubtful and obscure; for if it be doubtful, if it be in equilibrio, or even in suspense, the legal operation of the words must take effect. Lord HARDWICKE has laid down the rule without that caution and sagacity which so eminently distinguished him. *Garth v. Baldwin*, 2 Ves. 646. The

(Steele v. Thompson.)

intention must not be conjectural, but by declaration plain. *Wild's Case*, 6 Rep. 33. For, as on the one hand it would be very unreasonable to control the plain intent of the testator, so, on the other hand, when it is obscure, or even doubtful, and liable to a variety of conjectures, it is the best and safest way to adhere to those criteria which the wisdom of ages has established for the certainty and quiet of property. *Perrin v. Blake*, by Mr. Justice BLACKSTONE, *Harg. L. T.* 495. And, in p. 502, that learned commentator on the laws of *England* goes on further to enforce the marvellous operation of intention in devises; for whenever a technical rule is applied to devises, it must give way to the plain and manifest intent of the devisor, provided that intent be so fully expressed in the testator's will, or may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind, whether it was his intention or not.

Courts, on the doctrine of intention, profess to decide on the will itself, according to the particular words, objects, and views of the testator, and not on cases cited. Every case of this cast is individual. There can be no adherence to precedents, for no two wills can be exactly alike. A late eminent Chief Justice, when cases were urged on him, exclaimed, "If a case can be found, which is in words and syllables the same as this, and contrarily decided, I am bound by it." Another very eminent judge thus expressed himself: "I, for one, would be sorry to decide on this case by one of the same kind, unless, on comparison, the two are found precisely alike." And by the learned Judge PATTERSON, in *Lambert v. Paine*, 3 Cranch, 133, "The will of A. can afford little or no use in discussing and expounding the will of B., for in the great mass of wills, it is impossible to find two exactly alike." And by Mr. Justice YEATES, a judge not exposed to the charge of casting off the authority of decisions, it was said, "that to render cases on wills authoritative, they should be *in ipsissimis verbis*, and made by the testator in the same situation and circumstances." *Hoge v. Hoge*, 1 Serg. & Rawle, 157. Chief Justice WILMOT has often said that cases in the books on wills had no great weight with him, unless they are exactly on the very point. *Lessee of Roe v. Grew*, 2 Wils. 324, and *Lessee of Brown v. Holmes and another*, 2 Wils. 247.

It is a material consideration in the construction of wills, that the will is the will of an illiterate person, ignorant of law language and forms, and it certainly is, where it is a provision for children, by a father. In the construction of wills, technical words are only applicable to the nature and operation of the estate or interest devised, and not to the meaning of words. A man cannot create a perpetuity; he cannot put a freehold in abeyance, or limit a fee upon a fee. But otherwise there can be no magic or particular force in certain words; their operation must arise from the

(Steele v. Thompson.)

sense which they convey. The question of intention, as to its consistency with the rules of law, never can arise, until it is settled what that intention is, and this cannot be discovered but by taking the whole will together,—its four corners; and then, if the intention be apparent, there is no case in which the technical rule shall prevail. That words of inheritance are necessary to convey a fee simple, is certainly a good general common law rule; yet, in the case of wills, it is entirely subordinate to the testator's intention; for if that is discovered, no matter by what words, it must be effectually carried into execution. The same words may be taken in different senses in different wills, and even in the same will, owing to the association and the manner in which they are placed. My farm, my plantation, my house, contain no more than a description of the thing, and convey only an estate for life, because unconnected with any words of inheritance; but if such intention be discoverable, then a fee passes. *Lambert v. Paine*, 3 Cranch, 133. The expression of such intent admits of infinite variety, depending on the special and particular penning of the will. I acknowledge the law to be, and I disclaim our power to alter it, that in the devise of real property, where there are no words of limitation, and no necessary implication from the whole body of the will to give a larger estate, the devisee takes but an estate for life.

It is a sound construction of any instrument to look into the body of the thing to be construed, and to collect, as far as may be done, what is the intrinsic meaning of the thing, and if that can be clearly discovered by reference to its own context, then to give effect to that meaning. An introductory clause, declaring an intention to dispose of the testator's whole estate, and, my worldly substance, have been often decided to have the same import, and when united and linked with the devising clause will give a fee,—“As touching my worldly substance, with which it has pleased God to bless me, I give, bequeath, and dispose of the same in the following manner, that is to say, *I make over* and bequeath to my son *George* the plantation I now live on, *which hath two deeds*.” And this, it has been held in some cases, where the introductory clause is disjoined from the devising clause, by something intermediate, is not sufficient to give a fee.

The introductory words, “As to my worldly substance,” are not strict legal terms. “But what is substance?” says Lord MANSFIELD, “It is every property a man has,—it means all worldly wealth.” *Hogan v. Jackson*, Cowp. 307. Thus the testator sets out. He then proceeds to dispose of all that worldly wealth, and provides for every body he was bound to provide for; his wife, his children, his grandchildren; and singles out *George* his eldest son, (he enjoying, in this state, a right of primogeniture,) by giving him the mansion estate. It is a disposition of his worldly estate to *George*, which consists of a plantation with two deeds: thus worldly substance is incorporated with the plantation. *Grayson v. Atkinson*, 1 Wils.

(Steele v. Thompson.)

333, as far as a precedent can guide in the construction, furnishes an authoritative one, which never has been weakened by any contrary decision. It is a devise exactly like this: "As to my temporal estate, I dispose thereof as follows,"—and, after giving some legacies, the testator says, "All the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, tenements, and my share in the copper works, I give to A.," without any other words of limitation; held to pass a fee. The reason given by Lord HARDWICKE, is, "that a man is not confined to the use of technical words in his will, but may use what words he pleases, provided he explains his meaning clearly, and the testator has explained what he meant by his goods and chattels. &c.: he says, I meant my house, &c., and all the rest plainly referred to something he had mentioned before, which he was about to dispose of, and that was all his temporal estate."

On a cursory view, there may appear to have been clashing decisions on the effect of the introductory clause; but, on a careful examination, they can be reconciled, and this clear principle extracted:—The introductory clause, *per se*, and standing alone, unconnected with, and having no relation to the devising clause, will not enlarge the natural meaning of the words in the devising clause, so as to impart a fee; but where the introductory words, my worldly substance, are coupled with the devise of any land, as, my farm, my plantation, then the context gives a more large and comprehensive sense to the words than they otherwise would have borne; the whole interest in the land. Not that the denuded words, lands, &c. would carry a fee, *proprio vigore*, but as they derive force from the reference to the introductory clause. Undoubtedly, if there is nothing in the will to connect the different clauses, they must be taken separately; but the arrangement, the juxta position, points out the connexion which the testator intended, and is a plain declaration by one entire sentence, that the testator made over that part of his worldly estate which consisted of his homestead plantation, which had two deeds, to his son *George*, thus making it over to him under the same circumstances, and by the same title, which he himself enjoyed it. And in a recent case of the highest authority, *Wright v. Denn*, 10 *Wheat.* 244, Judge STORY, who examined all the cases with his usual industry and judgment, lays down a principle which fortifies the conclusion I have drawn, in this broad manner: "Wherever the introductory clause can be brought down to the devising one, it will have the effect of imparting a fee:" thus following the doctrine of Lord MANSFIELD, in *Hogan v. Jackson*, *Cowp.* 299.

Why is it that the words land, farm, or plantation should not give a fee? It is because such words are merely descriptive of the local situation. But where something is added, denoting the interest in the thing, and not a description of it, an incident of title, then a fee is given. Is there such a word to be found here? If it

(Steele v. Thompson.)

is to be found, judges will gladly avail themselves of it to effectuate the intention. There are several expressions which catch the legal eye, (and no other eye can doubt,) indicating strongly such intention. "I make over to my son *George* the plantation on which I now live, which hath two deeds." Though the plantation on which I now live is purely descriptive, yet the plantation which hath two deeds, is not matter of description, but of the title. He had described it before with all certainty,—the plantation on which I now live, identified it. To the matter of distinction there is superadded something more, and that superadded matter is the title. To the description there is an adjunct of title,—I make over to *George* my deeded plantation. Deeds with us, in common acceptance, signify patents. I make over to *George* my two patents. By this the whole interest in the patents passes. There does not want ancient authority for this; for by the bequest of an indenture of lease, the whole interest passes. *Wentworth's Office of Executors*, 249. By the devise of the indenture, the testator intended the thing granted by the indenture, and not merely the parchment on which it was written. Here are worldly substance and deeded land in the same line; uttered in the same breath. If any thing short of the word heirs will satisfy, this ought. If words tantamount will answer, I am at a loss for any stronger words than the testator has used. If this is not a necessary indication of a fee, I know not what will amount to it. We must look to the words in their common use, and to the common language of the country, and of the day when they were used. This will was written in 1758, nearly seventy years ago. Make over,—make over to my son,—make my two deeds over to my son,—is the strongest phraseology an illiterate countryman of that day would use, in giving the most absolute estate. "What I have I intend to settle in this manner," shows an intention to dispose of the whole estate. It is as strong as if the testator had said, all my estate I dispose of in this manner; and the case is stronger, because of the word settle. By this expression, the testator shows he meant to settle his whole estate. *Tuffnell v. Page, Barnard, Ch. Rep.* 14, 15. It satisfies my conscience of the intention of the speaker, when used by a common countryman, as fully as the word heirs from the mouth of a lawyer. In *Wright v. Denn*, 10 *Wheat.* 244, where there was a pretty rigid construction put on the words of a will, yet it was granted, that the words lands and tenements do sometimes carry the fee, and are not confined to local description, though, in the ordinary sense, they import the latter only; and when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention, to use them in a more extensive signification. Taking this as a rule, and it is a just and true one, does not the apparent intention of the testator justify the most extensive signification of the words that can be given to them? The words, "whereon I now live," denote the

(Steele v. Thompson.)

locality of the premises; "which hath two deeds," the quantity of interest, the title. Whatever makes manifest the intention to the legal eye, we have seen is sufficient to give a fee. "Freely to be possessed and enjoyed." *Hoge v. Hoge*, 1 *Serg. & Rawle*, 151. The testator gave to one of his sons a tract of land, provided he lives and enjoys it. The Chief Justice inclined to think that he took a fee, because the expression was, that he shall enjoy the land, and no restraint of any kind is laid on him. All my share or part, by one tenant is common to another,—property,—all my worldly effects, both real and personal,—all I shall die possessed of,—all I am worth in the world,—my lands wholly,—my improvement held by settlement right,—my freehold property,—my lands of inheritance,—the lands I hold by heirship. None more strongly denotes inheritable interest than my deeded plantation; many of them by no means so strongly. My deeded plantation to my son *George*, I make over, does as clearly denote the interest, as if he had said, I make over my fee lands. It conveys, in the emphatical language of the country, an unlimited estate, fee simple; it is a denomination of interest. Men's wills should be construed according to the known signification of words in the country where they are used. Circumstances may discover the intent of a testator. The clauses of a will may be united and taken together, so as to make a devise, which, on its face, is only for life, a fee. The introductory clause is always material and important, and very frequently, in devises of this kind, is considered as repeated in every subsequent clause. *Bramstone's Lessee v. Holyday*, 3 *Burr.* 1625, 1 *Bl. R.* 535. It is no objection to the force of the introductory clause, that it is the ancient hackneyed preface to all wills, and inserted of course by every schoolmaster in the country. That objection would not hold in this case, for this will most probably was of his own drawing. From the spelling, he could not have had the poor aid even of a country schoolmaster. He must have been *inops consilii* indeed.

But we have *American* decisions, decisions in our own courts on these very words. All my right in the *Patentees'* woods, to my children, gave a fee. *Newkerk v. Newkerk*, 2 *Caines*, 345. In *Caldwell v. Ferguson*, 2 *Yeates*, 380,—not a hasty *Nisi Prius* decision, but one of a full court, on a point reserved, "I give to *Hugh McFadden*, or his heirs, two hundred acres of patented land, on the waters of *Warrior's River*, as mentioned in the said patent, and the other undivided one hundred acres, I leave to my nephew *Benjamin*, according to the judgment of my executors dividing the same," passed an estate in fee. And although it must be admitted, that the decision went particularly on the ground of its being uncultivated land, in which a life estate could not be of any benefit to *Benjamin*, yet the learned Judge SHIPPEN, not disposed to unravel settled rules of property, was struck with the circumstance, that the testator takes notice that the land was patented, and considered

(Steele v. Thompson.)

it as one circumstance, which could not fail to impress a belief, that he meant to give a greater estate than for life. "It shows," he said, "that he had his patent in his eye; that he had it in his mind that he had a legal estate in fee simple in the premises; and not restraining the duration of the estate was a circumstance, though but a slight one, that he meant to give the whole estate he himself had in it to his devisees." Judge SHIPPEN had before said, that wherever there is an expression in the will which the court can lay hold of to enlarge the estate of the devisee, they will do so to effectuate the intention of the testator. Long before this, Chief Justice HALE had said, the meaning of a testator is to be spelt out by little hints. And our venerated judge concludes this valuable opinion with the remarkable saying,—“On the whole, therefore, I am satisfied in my conscience, from the words of the will, connected with the nature of the property devised, that the testator intended to give a fee simple to the objects of his bounty.” In *Roe v. Blackett*, 1 Cowp. 235, the same test had been adopted by Lord MANSFIELD, who held that to make a devise of lands, without any limitation, a fee simple, such a manifest intention must appear that the testator intended to give a fee, as may satisfy the conscience of the court in pronouncing it such. And, after all, this short test contains the body and spirit of the law. The word *estate* has run the gauntlet through all the courts of *Westminster Hall*. Many fine spun distinctions about *at* and *in* defeated the intention of many testators. Common sense at last prevailed, and broke the magic circle; and now the word estate, even where it is a local description, gives a fee, unless restrained by words expressly denoting an intention to give a less interest.

The cases are not numerous in *Pennsylvania*. In *Busby v. Busby*, 1 Dall. 226, (the first reported decision,) it was held but an estate for life, because the words, as to all my worldly estate, were unconnected with any particular devise, and because the circumstances of intention, for life and in fee, were nearly balanced. *French v. McIlhenny*, 2 Binn. 13, was by no means so strong in favour of intention to give a fee. Mr. Justice YEATES, not disclaiming all *English* authorities, decided on the principles of those authorities; as he understood them. The introductory words he looked on as a strong circumstance, when aided by the manner in which the testator devised his plantation. The weight of its authority, as a precedent, in a will exactly alike, is demonstrated by the difference of opinion among the judges. *Clayton v. Clayton*, 3 Binn. 476, wanted many of the features of fee simple, discoverable in this case. There was no introductory clause, no mixed devise of real and personal estate, no declared purpose of the testator defeated. It was a devise of the plantation on which he then lived, without any reference to the title by which the testator held it, which was considered as a description of the thing, and not the interest in it. *Morrison v. Semple*, 6 Binn. 94, in which

(Steele v. Thompson.

the word *property* was first decided in this country to give a fee, was because the word *property* signified the right and interest in the thing; and, when that decision was made, it was not only unsupported by any *English* authority then known, but in direct opposition to adjudged cases; for in 28 *Eliz.*, *Erasmus Cook's* case, a devise by a co-parcener to a stranger of her property, without other words, was held only to be an estate for life, for the word doth but signify her part in the land. *Swinb.* 155. And in 36 *El. S. B.* 15, it is said, that the words, all his lands, shall not be construed to mean the estate in the land. And when we are met by a decision of an early day in *England*, one may, without any offence against the laws of the land, say, that different rules in the construction of wills now obtain. Two hundred years ago the judges decided that the word *property* gave only an estate for life; but in our day, in 1812, (*Shell v. Pattison*, 16 *East*, 221,) it has been held, that the word *property* is large enough to carry the interest in the estate. And it is a remarkable coincidence, that about the same time, in *Morrison v. Semple*, the same construction was given, and for the same reason,—that *property* signifies the right and interest; and deeded plantation, are not as unapt words to carry a fee. I may, with great truth, claim that the current of authority in this state is in favour of the liberal construction.

I pass over the various conflicting decisions in *England*, with this further observation, that the intention of the testator, in those kinds of devises, has a growing influence; and that both here and there, the bent of the courts is, to lay hold of any expression which manifests an intention to give a fee, and so to construe them. The decisions of the several courts of the union, *New York*, *Massachusetts*, *Virginia*, *South Carolina*, as well as the Supreme Court of the *United States*, have the same inclination. In *Maryland*, before the revolution, in a cause in which the first talents were employed, and which was finally decided in a court of the last resort, by judges surpassed by none in *North America*, *Winchester's Lessee v. Tilghman*, 1 *Harr. & M'Hen.* 452, after the introductory clause, expressing an intention to dispose of all his worldly estate, the testator, after giving the house and plantation to his wife for life, and an estate tail to his granddaughter in other lands by technical words of limitation, and to his son *T.* a like estate, proceeded to the devise in question:—"I give and bequeath to my daughter *Elizabeth* three hundred acres of land lying in *Kent* and *Queen Anne* counties, called *Pharsalia*, but no part of my personal estate." This was decided, in the Provincial Court, in 1772, to give a fee; and in 1775 the judgment was affirmed in the Court of Appeals, *S. CHASE* and *PACA* for the plaintiff, and *JOHNSON*, *TILGHMAN*, *COOKE*, *HALLIDAY*, and *GOLDSBOROUGH*, for the defendant. The leading case in *Virginia* is *Kennon v. M'Roberts*, 1 *Wash.* 96: "As touching my worldly estate, my will and desire is, that it shall be employed and disposed as hereafter.

(Steele v. Thompson.)

I will and bequeath all my land in *Ochaney Island* and *Fenny Wood*, to my son *Robert*, and to my son *Thomas* all my lands at *Cargill*, and to my beloved wife and daughter, all the rest of my estate, real and personal:" held, that the sons took an estate in fee. In *South Carolina*, there are numerous cases to the same effect. *Wheatly v. Wheatly*, 1 *Dessauss*. 80, *Waring v. Middleton*, 3 *Dessauss*. 249, and *Clarke v. Mitchell*, *Id.* 168. The testator, after the usual introductory words of an intention to dispose of his whole estate, proceeds,—“I bequeath to my son *John* the choice of my two tracts of land, and the other tract I desire to be sold, and the money to be divided between my two daughters:" held, the son had an estate in fee, first, on account of the introductory words, secondly, because the testator intended a preference to the son, giving him a choice; and yet after he had made his choice, he would be in a worse situation than his daughters. So, here, the testator intended to prefer his eldest son, *George*, by giving him the mansion place. To *John* he gave his plantation in *East Nantmill* township: to his daughters *Rachael* and *Margaret*, the plantation in *East Fallowfield*: to his daughters *Mary*, *Ruth*, and *Ann*, fifty pounds each, when they came of age; and to *Elizabeth* as much as, added to what she had already, would make fifty pounds, out of his personal estate. Now, by construing the estate of *George* to be but for life, you make havoc of the testator's intention. The daughters, who got their equal portions in money, on *George's* death would come in for another portion out of the land; thus obtaining a double portion. Nothing could more derange the whole plan of the testator. It is irreconcilable, that a father setting out with a declaration that he intended to dispose of all his worldly substance among his children, when he comes to partition it out among them without limitation, should intend less than a fee,—less than his own interest in the lands, when he gives to his sons their portions in land, and to his daughters their portions in money. In *Massachusetts*, in the case of *Richardson v. Noyes*, 2 *Mass. R.* 58, the will begins with the introductory clause, as to the testator's estate. The devise in question was in these words, “I give to my sons *John*, *James*, and *William*, all my other lands lying in *Sudbury*.” Mr. Justice SEDGWICK, who delivered the opinion of the court, said, “We are inquiring for the intention of the testator, and it is clear, from a view of the whole interest, the preamble, the provision he makes for his children, and the ultimate disposition of the residue, that he intended a complete disposal of all the property he should leave behind him; and I have no doubt he intended his sons should take an estate of inheritance.” To the same purpose is *Cook and others v. Holmes*, 11 *Mass. R.* 528. In *New Hampshire*, *Fagg v. Clarke, Adams*, 163, after the introductory clause of intention to dispose of his whole estate, the testator devised as follows: “I will all my landed property in *N. to J. D.*” The devisee took a fee. In *New*

(Steele v. Thompson.)

York, I have already noticed the case of *Newkerk v. Newkerk*. In 17th *Johns.* there are two decisions. *Ferris v. Smith*, page 221, is a strong case, I admit, in favour of an estate for life, but it is distinguishable from this in two essential particulars. The word *land* there was purely descriptive, there was no mixed devise of real and personal estate, and (which alone would show it to be matter of description,) it is, "my land beginning at the river and running west;" and the omission of one word, and inserting another, we have seen, may give a turn to the whole devise, for it is manifest that courts catch at every thing to enlarge the estate. In *Jackson v. Housel*, 17 *Johns.* 281, Chief Justice SPENCER, in considering the effect of the word property as to giving a fee, and after citing *Morrison v. Semple* with his full assent, "If it be objected," said he, "that a devise of one's property has not been heretofore adjudged to convey all the interest of the devisor in any of the *English* cases, I answer, I am not apprized of any case to the contrary. The terms, all my property, are extensive, and as comprehensive as all my estate, or all my effects, and they were not technical words to vest a fee; they were rendered operative, because the intention of the testator was manifest that a fee should pass. The maxim, *qui hæret in litera hæret in cortice*, might well be applied to any judge, who would refuse to carry into effect the intention of a testator, where that intention is plain, and where he employs words as significant and comprehensive as those which have been adjudged to carry a fee." We have seen, that judges in *England* have gone thus far lately in contradiction to former decisions, as to the word property, and we are not bound to wait until they decide on the words, deeded lands, that they carry a fee, because such a mode of expression is not used in that country, and is peculiar to *Pennsylvania*. As denoting the legal title, this may not be the technical meaning of the words, but they are apt words, words of a general signification; not merely of locality, but of title. It has not escaped us, that this is a mixed devise of real and personal estate, a matter by no means unimportant in ascertaining the testator's intentions. Mr. Justice STORY, in *Wright v. Denn*, observed, that it operated most strongly on the mind of Lord HARDWICKE, in *Grayson v. Atkinson*, 1 *Wils.* 333; and there is, to this purpose, the strong case of *Johnson v. Johnson*, 1 *Munf.* 549, where it was held, that where an illiterate testator, uses the same words in devising his real and personal estate in the same clause, it is fair to infer that he intended to give them the same effect. It cannot be pretended but that, if *George* had died, his representatives would have been entitled to his personal estate, and if he had left a son, that son would have been entitled to the two good horses and ploughs, the heir looms; but he would have no land to plough. The testator intended the horses and ploughs and the lands devised to his sons should go together; and it is from these little hints of a testator, ignorant and illiterate, (as the pen-

• (Steele v. Thompson.)

ning of this will shows this testator to have been,) that his intention is to be spelt out; and an attention to these circumstantial evidences of intention is always paid by judges, for in *Wright v. Denn*, the opinion is closed by the court with noticing the want of the introductory clause, and distinguishing that from all other cases bearing on the question, and which always show an intention to dispose of the whole property. Here is this introductory clause, the absence of which was considered as so important,—here is the mixed devise of real and personal estate, so significant,—here is plantation, with its title, so demonstrative: in short, nothing is wanting but the technical word heirs. But there is further light, if there be any obscurity, cast on the intention of the maker of this will, from an examination of the whole scope and plan of the will. The settled rule is, only an estate for life where there are no words of limitation, or other words in the will, to show the testator's intention to pass a fee, or unless the devise be for special purposes, which cannot be effected without a larger estate than one for life. It is, then, to be seen whether, in order to effectuate the views of this testator, to be collected from the whole scope of his will, it is not necessary to give such estate, and whether giving a less one would not frustrate his whole plan. The support of a young family, until they come of age to take care of themselves, and a residence for a widow, are always moving points with men who do not leave large monied estates; provision for his wife, his children; and his grandchildren; keeping them together, under the care of their mother, in the mansion house, as they had been maintained and educated in their father's lifetime, until *George* came of age. The children were small,—*George*, the eldest son, about eight years of age; the personal estate was to be kept together until he came of age, “and after *George* comes of age, my wife is to have such part of the house she pleases, while she lives a widow.” Now, if *George* had only a life estate, on his death the mansion plantation would pass directly over to his brother and sisters; and, if he left a son, the favourite of the law as it then stood, he would be nearly disinherited, for he would have two ninths only of the mansion plantation; and this in direct opposition to the only reason given in the law why he should not inherit the whole, viz. to prevent the disinheritance of the heir. Now, *George*'s son would be the very heir and favourite of the law, whom the law would thus disinherit; for he would have a double part in lineal, and the whole in collateral descents. When *George* arrived at full age, these great changes were to take place. The personal estate was to be divided, the family to break up, *George* to take possession of the mansion, his mother to have a choice of an apartment in it for life. There is no provision for the death of *George* under twenty-one, nor for the maintenance of the widow and children, nor for his own children; all are deprived of their maintenance, education, and schooling, and the widow of a home. To prevent such con-

(Steele v. Thompson.)

sequences, quite inconsistent with the design of the testator, and to effectuate his intention, *George* must have an estate commensurate with it. A life estate would not be sufficient for that purpose,—it could be no other than an estate in fee, because the estate to the widow, which is an estate of freehold, the maintenance and education of the children, are carved out of the immediate estate given to *George*, which is a present devise. An estate for life would not be adequate, for on his death, his estate, and all incidents and dependences on it, would cease. The mansion house and the personal property, and the mother and children were to be maintained together, as in the father's lifetime, until *George* came of age; but if he died under twenty-one, all would be separated. The estates must be separated, and the wife and children must be separated; for there is no other means provided for keeping them together.

There are cases much stronger than this, to show that a fee must of necessity be given. I put some of them by way of illustration: A testator devises to A. B. without words of limitation, but on condition that he should not suffer the husband of his daughter to come on the premises, on any condition whatsoever: held, that in order to effectuate the intention of the testator to exclude his son-in-law at all events from coming on the premises, which he might otherwise do on A. B's. death, it was necessary to give A. B. a fee. So, in *Mudge v. Blight*, 1 *Cowp.* 352, where the testator gave to his wife the west part of his dwelling-house, with as much wood croft home to her as she shall have need of by my executors, hereafter named, and devised the lands to the executors without words of limitation, it was considered a circumstance of weight to give a fee, because the stock of wood on the estate might fall short of her necessities; and it was but reasonable to infer, that such an interest was intended, as would enable them to comply with the testator's direction, fully and completely in every respect.

I agree that the devise of the plantation will not pass the fee, but I take this whole will in connexion; the introductory clause in connexion with the devising clause, the deeded land as synonymous with fee, the mixed devise of real and personal estate, the maintenance of the wife and children. I view its whole complexion. The will being in general terms, while viewing them in one sense, a complete disposition of the whole, will answer every view of the testator; taking them in another, will leave a chasin, and frustrate his whole design. I think it is the duty of courts to take them in that sense which is most likely to be agreeable to the testator's intention. *Ibbotson v. Beckwith*, *Talbot's Cases*, 157. The inclination of judges of modern times, is, where the words are capable of an extended signification, so to take them, and not to make them a matter of mere description, where the testator did not use them in that sense, but as conveying the interest. The only difference

(Steele v. Thompson.)

between wills and deeds is, that in the latter, technical words are necessary to pass a fee, but in the former, equivalent words, words importing such intention. They must be plain and manifest, and not left to the latitude of a guess. There is but one rule, the dictation of plain common sense, so long as courts of justice profess an adherence to the plain intention as their guide. If they do at some times give way to the legal construction, and at other times it shall not govern, there will be no rule to judge by, nor will any lawyer know how to advise, which is a mischief courts ought to prevent. Better at once to discard all regard to intention, and return to the strict construction which prevails in deeds, or adhere firmly to the intention, when that can fairly be made out; but not at one time to judge by one rule, and at another time by another rule. I, for my own part, do not think it is treating a man's will fairly, when you entertain no doubt of his intention, to put a rule of cases, when it possible there might have been an intention different, from an apparent, visible, and manifest meaning. Nor do I think it a just interpretation of a man's will to look for different uses of the words by other persons, when we have the index of the testator's mind to resort to, in the instrument itself. When he has said, "By my worldly substance, I mean my deeded plantation," we ought to give the words their largest sense, construe them in their most comprehensive signification, when that is the sense in which the testator has employed them.

I conclude an opinion, which to many may appear tedious. My excuse is, the deep impression in my mind of the general importance of the subject, and of the great door to litigation that will be opened, by going back to a strict construction of the words in this country, where every man who can write his name considers himself competent to draw any will, and where the act itself is left too often for the last moments. But I close in the words of Judge SHIPPEN and Lord MANSFIELD, that, on the whole, I am satisfied in my conscience, from the words of the will, from its whole tenor and complexion, that the testator intended to give an estate in fee to all his children to whom he devised his lands, in the same manner as he intended those to whom he gave money and not lands,—the whole property in it, and not the use of it. In coming to this conclusion, I have confined myself within the pale of prior decisions. I hope my wishes to effectuate the intention of the testator, (which those admit who differ from me, and which they regret they cannot reconcile with their idea of the rules of law, to carry into effect,) have not been the father of my thoughts; and that an adherence to the principles of law, or rather to the evidences of intention, and rules of interpretation have guided me. I may be mistaken in the law; I ought to be diffident and feel distrust, but I have given my honest judgment, according to my best knowledge, and I am only anxious to be understood, as not shaking off dependence

(Steele v. Thompson.)

on settled interpretations, but professing to be governed by them, though I may have misunderstood them. I am, for this reason, of opinion the judgment should be reversed.

I entirely agree with the Chief Justice, for the reasons given by him, that the acknowledgment of the conveyance, by the feme covert, is radically defective, and of no validity.

Judgment affirmed.

[PHILADELPHIA, APRIL 10, 1826.]

LEE *against* GIBBONS, Guardian of WRIGHT.

IN ERROR.

Where the goods of a decedent, or the proceeds thereof in money, come into the hands of one, who declares that he holds the property in trust for the children of the decedent, the children may, if all the debts of the decedent are paid, maintain a joint action against such person for money had and received, and recover the amount received by him, without having taken out letters of administration on the estate of the decedent.

But, if such person has acted unfairly, and wasted the property, the children can, in this form of action, recover no more than he has actually received.

On a writ of error to the District Court for the city and county of Philadelphia, the case was thus:

William Wright, Elizabeth Wright, and Jane Wright, minor children of *John Wright*, who had absconded sometime before the commencement of the suit, and of whose death some evidence was given, by their guardian, *George W. Gibbons*, brought an action for money had and received against *William Lee*, the plaintiff in error, to recover the proceeds of certain personal property, said to have come into the possession of the said *Lee*, as trustee of the said children, and to have been sold by him. It appeared in evidence, that *Wright* absconded on the 9th or 10th of *December*, 1810, leaving a widow and children, the plaintiffs in this action, and certain personal estate. There were debts due from him at the time he absconded. No letters of administration were ever taken out on his estate, but the widow kept possession of the property, and paid all the debts except one, which remained due when the action was instituted, but was said to be barred by the act of limitations. After her husband had absconded, the widow acquired more property, and *Lee*, the defendant below, who was her brother, advanced to her one thousand eight hundred and seventy-five dollars, which was invested in part in the furniture and stock. She continued the same line of business as her husband, by the advice and under the name of *William Lee*, who repeatedly declared that it was for the benefit of the children. Her proceedings were all by the advice and under the agency of *Lee*, with a view, it was

(Lee v. Gibbons, Guardian of Wright.)

said, to conceal the property from the creditors of *Wright*. Within seven years, there were reports, both that *Wright* was dead and that he was not dead; and one letter was received, and produced by *Lee* on the trial, saying that he was dead. In the spring of 1814, the widow, by the advice of *Lee*, married one *William Chase*, previously to which the stock, &c. were appraised, and the following agreement signed by *Lee* and *Chase*:

“Estimation and valuation of the following goods and household furniture, at the house and shop where Mrs. *Wright* now lives, belonging to me, *William Lee*.—May 23, 1814.

Shoes and stock,	- - - -	\$1429,11
Together with household furniture,	-	2000,00

“This is to certify, that I hereby agree to take the above named goods and household furniture from *William Lee*, at the above valuation or prices, as above stated, and also the boys, and cash in hand, and for the true and faithful payment of the whole two thousand dollars, and every part thereof, I give him my bond and warrant of attorney for the same, at the time of my receiving a transfer in the above property, which is the true consideration of the bond.

(Signed) “*William Chase*.”

Chase accordingly gave to *Lee* his bond, with warrant of attorney, for two thousand dollars. It was said by some of the witnesses, that *Lee* agreed to take these papers for the benefit of the wife and children of *Wright*, and by others, for the benefit of the children alone. *Chase* continued the business until the 27th of June, 1814, when, in consequence of some misunderstanding between them, on a subject not connected with these transactions, *Lee* entered judgment on the bond and took out execution, which was levied upon the household goods and stock. A motion was made, on behalf of *Chase*, to open the judgment and let him into a defence; but *Lee* and *Chase* afterwards agreed to divide the stock, which was valued at one thousand four hundred and twenty-nine dollars, and eleven cents. *Lee* took half, and sold it for six hundred and twenty-five dollars. *Chase* kept the remaining half and used it, and the furniture in the house in which his wife and children resided. In the spring of 1815, *Chase* removed to *New Jersey*. *Lee* followed him there, and in November, 1817, entered a judgment against him and levied on the furniture, which was in part the former property of *Wright*, and in part acquired by the industry of Mrs. *Chase*. When the sheriff's sale took place, *Lee* purchased the whole himself. The amount was not given in evidence, but *Lee* declared he purchased for the use of the children, and had no claim except for them.

The counsel for the defendant requested the court to charge as follows:

1. That in an action for money had and received, the plaintiff must prove that the defendant has received his money.

(*Lee v. Gibbons, Guardian of Wright.*)

2. That in such action nothing more can be recovered, than the sum actually received, with interest for the detention.

3. That when the subscribing witnesses to a bond are dead, or have become interested, the legal way of proving the bond, is to prove the handwriting of the subscribing witnesses.

4. That the children of a person dying intestate, leaving personal estate or debts, in *Pennsylvania*, cannot, without administering to the estate, maintain a suit in their own name to recover such goods or debts.

5. That if they can maintain such suit, it cannot be done by them jointly, and without joining their mother, if she is alive.

The court charged the jury as follows:

“1. and 2. That in an action for money had and received, the plaintiff must prove that the defendant has received money, to which the plaintiff is entitled; but positive proof is not required. If from circumstances the jury are satisfied of the receipt of such money, it is sufficient. The jury must determine, whether the goods mentioned in the inventory, which had been given in evidence, had been converted by the defendant into money. *If they had been so converted by the defendant, fairly and bona fide, the defendant would have been liable only for the exact sum he had received, with interest; but if he had wasted the goods by sales of them at low prices, to the prejudice of the trust, he was answerable according to their value, of which the jury would judge.*

“3. That when the subscribing witnesses are dead, or have become interested, the legal evidence of the execution of a bond, is to prove the handwriting of the subscribing witnesses, which is sufficient for it to go to a jury; but the opposite party is not thereby precluded from impeaching the bond, and the defendant might strengthen his case, by proving the handwriting of the obligor.

“4. and 5. That it had been argued, on the part of the defendant, that *John Wright's* estate was insufficient to pay its debts, of which the jury would judge from the evidence;—that the evidence given that the shop goods were manufactured after the death of *John Wright*; that a part of the furniture also was subsequently acquired, and that all the debts had been paid by *Mrs. Wright*, sufficiently showed that an administrator of *John Wright*, if administration should be taken out, could not support an action for them. The only debt alleged to be unpaid, was a balance claimed by *Mr. Wood*, and the debt which *John Bell* said was due to him, but which appeared doubtful, and both of which were barred by the statute of limitations; that the defendant, having intermeddled with *Wright's* goods, was liable to creditors, as executor, of his own wrong; *that it was enough to say, that the plaintiffs did not claim as heirs or next of kin, but as cestui que trusts, and their action, in the present form, was maintainable.*”

(*Lee v. Gibbons, Guardian of Wright.*)

P. A. Browne, with whom was *Levy*, for the plaintiff in error.

1. The court erred in charging the jury, that "if the defendant had wasted the goods by sales of them at low prices, to the prejudice of the trust, he was answerable according to their value, of which the jury would judge." We say, that, in this form of action, for money had and received, &c. the defendant is liable only for the exact sum of money received by him. The action affirms the sale, and claims what has been received under it. *Moses v. M'Ferlan*, 2 Burr. 1008. *Lindon v. Hooper*, 1 Cowp. 416. Bull. N. P. 129. *Walker v. Constable*, 1 Bos. & Pull. 306. 2 Id. 446. (note.) *Eastwick v. Hugg*, 1 Dall. 222.

2. The plaintiffs were not entitled to maintain an action in their own names, and, if they were, they should have sued severally. There ought to have been an administrator of the estate of *John Wright*, who alone could support the action. There was proof that one debt was unpaid. The executor represents the testator, as to all his personal contracts. *Toll. Law of Executors*, 431, (Am. Ed.) The heir, therefore, may bring real, but not personal actions. 3 Bac. Ab. 457. No action can be maintained by the heir, upon a covenant broken in the life of the ancestor. *Com. Dig. Adm. B.* 13. *Covenant, B.* 1. 3 Bac. Ab. 91. The heir cannot sue for waste committed in the life of the ancestor. *Com. Dig. Waste, C.* 3. The plaintiffs cannot sue, as being entitled under the act of distributions, as next of kin. An administrator alone could support the action. *Blackborough v. Davis*, 1 P. Wms. 48, 49. *Stat. 31 Ed. 3. c. 11.* *Hughes v. Hughes*, 1 Lev. 233. *Stat. 22, 23 Car. c. 2. c. 10.* 3 Ruff. 334. *Act of the 29th of April, 1794, sect. 1.* 3 Sm. L. 143. *Act of the 21st of March, 1772.* 1 Sm. L. 383. If letters of administration should hereafter be granted on the estate of *John Wright*, the defendant will not be protected by a recovery in this action against a suit by the administrator. 2 Binn. 298. We deny the position, that the defendant took possession of the property in question as the trustee of the plaintiffs. He took it as the executor *de son tort* of *John Wright*. An executor *de son tort* may be sued by a creditor, by the lawful executor, or administrator, but is not liable to suit by the next of kin. *Toll.* 368, 369. 3 Bac. Ab. *Executor and Administrator*. But if the plaintiffs had cause of action, they could not maintain a joint suit, but should have brought separate actions for their distributive shares. 4 Dall. 147.

Norris and Rawle, for the defendants in error.

This action is not brought by the plaintiffs below for a distributive share of their father's estate, but is founded upon a trust for their benefit. *Wright's* debts were all paid by the industry of his widow, and all his stock in trade was applied to that purpose. So that all the stock on hand, when she married *Chase*, for which *Lee* took a bond from *Chase*, had been acquired after the death of *Wright*, and this bond was avowedly taken in trust for the

(*Lee v. Gibbons, Guardian of Wright.*)

children. *Lee* had no claim to the property. He said once he took the bond in trust for the children, and once that he took it for the wife and children. But when he issued a second execution against *Chase* in *New Jersey*, and bought the goods, he said it was in trust for the children. Under these circumstances, the action was rightly brought by the persons in whose favour the trust was declared. If a trust be created in favour of one without his knowledge, he may affirm it and support an action. *Neilson v. Blight*, 1 *Johns. Cas.* 205. *Moses v. Murgatroyd*, 1 *Johns. Ch. Rep.* 119. *Clarke v. Shee*, 1 *Cowp.* 197. *Longchamp v. Kenny*, 1 *Doug.* 137. *Abbots v. Barry*, 6 *Eng. Com. Law Rep.* 157. *Walker v. Smith*, 4 *Dull.* 389.

The action was rightly brought by the plaintiffs jointly. This suit is in the nature of a bill in equity, in which all the parties interested must join. 3 *Br. Ch. Rep.* 365. It was a joint promise, founded upon a joint consideration, and therefore a joint action lies. *Vaux v. Steward*, *Style*, 156, 157, 203. *Saunders v. Johnson*, *Skin.* 401. *Weller v. Baker*, 2 *Wils.* 414. *Coryton v. Lythebye*, 2 *Saund.* 112, 116, (note 2.) 7 *Mod.* 116.

Can the plaintiffs recover more than the money received by the defendant, together with interest? It is admitted they cannot, where there is an actual receipt of money; but where no money has been received, but a bond taken, the amount of the bond may be recovered. The plaintiffs were entitled to recover something, and the question is, how much? On that point the first part of the charge was right, though something inaccurate might have been added. But where, upon the whole, the charge is right, the court will not reverse the judgment, because there might have been error in some respects. *Stafford v. Walker*, 12 *Serg. & Rawle*, 190.

The COURT observed to the counsel of the defendants in error, that they had cleared the case of all difficulties except one, viz. that if the defendant below had wasted the goods, he was answerable *in this action* for their full value. This the counsel conceded to be error, but requested that the court would deliver their opinion upon all the points which had been made below.

The opinion of the court was delivered by

DUNCAN, J. This was an action for money had and received for the use of *William, Elizabeth, and Jane Wright*, infant children of *John Wright*, deceased. The evidence was, that certain property belonging to their father, who had deserted his family and disappeared, and whose death was fairly to be presumed, under some understanding between his wife and her brother, *William Lee*, the plaintiff in error and defendant below, was concealed and covered, as was said, to prevent their being seized for the payment of *John Wright's* debts. Certain proceedings, to give some colour to the acts of *William Lee*, were done, principally by his advisement. In the course of years, this property, or a conside-

(Lee v. Gibbons, Guardian of Wright.)

erable part of it, has been transmuted in a course of business carried on by Mrs. *Wright*, in the name of *William Lee*, who repeatedly declared, it was for the use of the children. In 1814, after the marriage of Mrs. *Wright* with one *Chase*, an appraisement of the goods was made, and the whole stock and furniture were taken by *Chase* at two thousand dollars, who gave his judgment bond to *Lee* for the amount. *Lee*, in the same year, on some misunderstanding with *Chase*, entered up his judgment, issued an execution, and levied on these goods. A motion was made to set aside the execution, and an issue was directed by the court. Before this came to trial, *Lee* and *Chase* came to some agreement, and divided the goods between them. These goods were the furniture of *John Wright*, and articles in the shoe-making line, manufactured by Mrs. *Chase*, after the death of her husband, she having married her journeyman, *Chase*. In 1817, *Lee* entered up his judgment in *New Jersey*, to which state *Chase* had removed, and levied on the furniture and other property which was partly the property of *Wright*, her first husband, and partly property acquired by Mrs. *Wright* and sold, always declaring that he bought them for the use of the children.

Two questions were made in the District Court: 1st. Whether the plaintiffs could sustain an action in their joint names, or at all without taking out administration on the estate of their father, *John Wright*. 2d. Whether, in case they proved any money to have come into the hands of *William Lee* on account of these goods, they could in this form of action recover more than *Lee* actually received?

It is quite clear, that the children of a decedent cannot bring any action for his property without administration, and that even against an administrator they could not join in the same action for their distributive parts. In that aspect of the case, it would be with the plaintiff in error; but this action is not so brought. It is brought against *Lee*, not as trustee by act and operation of law, but on an express declaration of trust that he held the property for the use of the children of *John Wright*. In this action, which is in fact a bill in equity, it will not be endured, that he should say to *cestui que trusts*, all these transactions between your mother and me are in fraud of the law, to conceal the property from your father's creditors, and I am only to account to the legal administrator for them. The children participated in no fraud. If their mother, their natural guardian, and their uncle, standing in *loco parentis*, conceived it proper to go on without administration, and take possession of the effects of *John Wright*, and these effects, or the proceeds of them in money, have come to the hands of the defendant, on his express promise that he held them in trust for the children, he would be liable for the money he has received in this trust, to the children in this form of action. It disturbs not the order of payment of debts, for all subsisting

(Lee v. Gibbons, Guardian of Wright.)

debts have been paid. *Cui bono* take out letters of administration? The uncle has their father's goods; the father's debts are paid. The uncle has received the money on an express undertaking to account to them for it. But it is said, they should each one have brought an action for their separate proportion. The action is founded on a promise implied or expressed. If it be on an implied promise, then it must follow the nature of the consideration, and as that is joint or several, so must the action be. But where it arises on an express promise, as here, that he held in trust for all the children; and as the action could not be sustained at all, without proof of this, then the nature of the action is governed by the consideration of its being an express promise, and that being a joint promise, all to whom it is made must, or at least may, sue jointly on it, and after having recovered, settle among themselves the proportion of each. This is now well settled in *Coryton v. Lythebye*, 2 Saund. 116, a. (note 2,) and in *Baggs v. Curtin and others*, 10 Serg. & Rawle, 211. But in this form of action, no more can be recovered than the money actually received by the defendant; not what he ought to have received, had he acted fairly and honestly. Though there may be some positions in *Moses v. M'Ferlan*, 2 Burr. 1005, by Lord MANSFIELD, which his successors have cancelled out of it, the leading doctrine of the nature of this action never has been questioned. The great objection to some of his positions is, that they have been laid down too large, when he says that a court of common law may sustain this action, wherever one man has money which another ought to have, or wherever one man has an equitable right to the money, he also has a legal action. Since courts of common law cannot administer equity in the same way courts of equity can, we have adopted the most liberal principles in this action, and because we have no court of chancery, sustained the action where one man holds unjustly the money of another. You may, in every case, waive the tort. Where the party has received your money, trespass or trover may be converted into this action. Where the defendant has turned the article into money, or there is reasonable evidence that he has, as in the case of the masquerade ticket. But where you do this, you ratify the conversion; you adopt his act, and can recover nothing more than he has received. In *England*, not even interest, but here, the money received, with the interest. A man may disaffirm the act *ab initio*, by reason of the fraud, and bring his special action, and recover his actual damages, or affirm it and demand the money; he may make his election. The opinion of the learned judge was certainly correct, as to the right of the plaintiffs, provided the jury were satisfied of an actual declaration of trust by *Lee*, that he held the property bought in for the benefit of the children, which would be equivalent to an express promise to account for it to them upon a meretorious and legal consideration; for the property of

(Lee v. Gibbons, Guardian of Wright.)

their father was their property, and a slight matter might convert him into a trustee, requiring, it is true, some evidence of an acknowledgment of accountability to them, to maintain this action. But, with respect to the amount to be recovered, the court cannot accede to the measure of damages. That is in opposition to the first principle of the action, which is, that no more money can be recovered than the defendant has received. The instruction to the jury is a departure from this, for they were charged, "that if the goods had been converted by the defendant fairly and *bona fide*, the defendant would only have been liable for the exact sum he had received, with interest; but if he had converted the goods by sales at low prices to the prejudice of the trust, he was accountable according to their value, of which the jury were to judge." Now, we have seen, that wherever the plaintiff makes his election to proceed in this form of action for the money, he affirms the act of conversion and adopts the sale, and goes only for the price, not for the value. In every other matter the opinion is free from exception; but in this there is error.

GIBSON, J., was absent.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, APRIL 10, 1826.]

AYRES and others *against* FISHER.

IN ERROR.

Where the defendant appeals from an award of arbitrators in favour of the plaintiff, *for a sum of money*, it is sufficient if the condition of the recognizance be, either, "that if the plaintiff, in the event of the suit, shall *obtain a judgment for a sum equal to or greater than the report of the arbitrators*," or that "if the plaintiff, in the event of the suit, shall *obtain a judgment as or more favourable than the report of the arbitrators*," the defendant shall pay, &c. without inserting both conditions.

WRIT of error to the Court of Common Pleas of *Montgomery* county, in which court *Wendle Fisher*, the defendant in error, was plaintiff, and *William Ayres*, *George Kline*, and *William McGlathery*, commissioners of *Montgomery* county, were defendants.

After argument by *Potts*, for the plaintiffs in error, and *Kittera*, for the defendant in error.

The opinion of the court was delivered by

TILGHMAN, C. J. This action was originally brought by *Wendle Fisher*, against *William Ayres* and others, commissioners of the county of *Montgomery*, before a justice of the peace, who gave

(Ayres and others v. Fisher.)

judgment for the plaintiff for the sum of sixty-seven dollars and ninety-six cents. The defendants appealed to the Court of Common Pleas, where the action was carried before arbitrators, who made an award in favour of the plaintiff for the same sum of sixty-seven dollars and ninety-six cents. From this award the defendants appealed, and entered into a recognizance, which, in the opinion of the Court of Common Pleas, was defective, and therefore the appeal was dismissed. The form of recognizance, where the defendant appeals, is prescribed by the act of the 20th of March, 1810, 5 Sm. L. 131, sect. 14. It is to be in the nature of special bail, with condition, "that if the plaintiff, in the event of the suit, shall obtain a judgment for a sum equal to, or greater, or a judgment, as or more favourable than the report of the arbitrators, the said defendant shall pay all the costs that may accrue, in consequence of the said appeal, together with the sum, or value of the property or thing awarded by the arbitrators, with one dollar per day for each and every day that shall be lost by the plaintiff in attending to such appeal, or, in default thereof, shall surrender the defendant or defendants to the jail of the proper county," &c. In the recognizance in question, the condition is, "that if the plaintiff shall obtain a judgment, as or more favourable than the report of the arbitrators, then the defendant shall pay all costs that may accrue in consequence of the said appeal, together with the sum awarded by the arbitrators, with one dollar per day for each and every day that shall be lost by the said plaintiff in attending to such appeal; or, in default thereof, shall surrender the said defendant to the jail of the proper county, in discharge of the said recognizance." The alleged defect is, the omission of the words, *shall obtain a judgment for a sum equal to or greater*. But I think this point is settled by the principle adopted in the case of *Witman v. Ely*, 4 Serg. & Rawle, 260. In that case, the words, *shall obtain a judgment as or more favourable than the report of the arbitrators*, were omitted, yet the recognizance was held to be good. The principle is, that if the words of the recognizance are sufficient to cover the actual case, so that he may recover upon it any thing which he ought to recover, it is sufficient. Where an award is made in favour of the plaintiff for a sum of money, it will be sufficient if the condition be, "that if the plaintiff, in the event of the suit, shall obtain a judgment for a sum equal to or greater than the award of the arbitrators;" or if it be, "that if the plaintiff, in the event of the suit, shall obtain a judgment as or more favourable than the report of the arbitrators," without inserting both; because either of these conditions is applicable to a report for a sum of money. But if the report had been, not for money, but something to be done by the defendant, then the recognizance would be bad, unless it contained the words, "shall obtain a judgment as or more favourable than the report of the arbitrators," because those words would have been neces-

(Ayres and others v. Fisher.)

sary to make the recognizance suitable to the actual case. Let us suppose now, that in the present case the appellant had been suffered to go on with his appeal in the Court of Common Pleas. If judgment went in his favour, it must have been to recover a sum of money, because nothing but money was demanded. Then, by comparing the sum for which judgment should be obtained with that awarded by the arbitrators, it would have appeared at once whether the plaintiff had obtained a judgment as or more favourable than the report of the arbitrators. So that this recognizance, which was taken for the benefit of the plaintiff, secured to him every advantage intended to be given to him by the act of assembly. I am of opinion, therefore, that it was a good recognizance, and consequently that there was error in dismissing the appeal. The judgment is to be reversed, and the record remitted to the Court of Common Pleas, with orders to reinstate the appeal and proceed in it.

Judgment reversed, &c.

[PHILADELPHIA, APRIL 15, 1826.]

LIPPENCOTT and Wife *against* WARDER, Executor of
BARNES.BARNES, by her next friend, LIPPENCOTT, *against* the
same.

CASE STATED.

Testator, after a bequest of certain personal property, devised to his wife *C.*, and his daughter *A.*, and any other child or children he might have at the time of his decease, their heirs and assigns for ever, in equal shares, all his other estate and property, real and personal; and, in the event of the death of either, the share of the party dying, to go over to the survivor or survivors, in fee simple; but should his children, or either of them, die without issue, such issue to stand in the place of his, her, or their deceased parent. He appointed his wife *C.* executrix, and *J. W.*, jr., executor, with power to sell the real estate. The testator left his widow *C.*, his daughter *A.*, and a son *B.*, born after his death, who died in his infancy, leaving no issue. *J. W.*, jr., alone proved the will, but both he and the executrix joined in the sale of the real estate, for which they jointly gave deeds, and received securities in their joint names for the part of the purchase money which remained unpaid. *J. W.*, jr., had in his hands, as executor, personal property, money or securities for money, arising from the sale of the real estate, rents and profits received from the real estate, and interest or income of the personal property, and proceeds of the real estate. *Held*, that the widow, *C.*, took an indefeasible estate in fee simple in one third; the children, *A* and *B.*, a defeasible one, and, upon the death of either of the children without issue, the estate went over to the survivor by way of executory devise, and, consequently, on the death of *B.* without issue, the whole fee simple in the two thirds vested in *A.* And that the husband of the widow was entitled, in her right, to one third part of the proceeds of sale, and the guardian of the daughter to the other two thirds; and that where the money had not been received, they had a right to call upon the executor to proceed to recover the money due on the securities, or to assign them to the several plaintiffs, in proportion to their rights.

CASE stated for the opinion of the court, in substance as follows:

Barnaby Barnes duly made his last will and testament, dated the first day of *February*, 1820, (prout the will,) leaving a widow, the above named *Christiana*, now *Christiana Lippencott*, a daughter, the above named *Augusta Barnes*, and a son, *Barnaby*, born after the death of his father. *Barnaby Barnes*, the son, died in his infancy, leaving no issue.

Jeremiah Warder, jr., above named, proved the will, and took upon himself the execution thereof. The said *Jeremiah Warder*, jr., as executor, and the said *Christiana*, as executrix, jointly, made sale of part of the real estate, and executed and delivered deeds for the same, in the names of both. Part of the purchase money was paid, and for part securities were taken in the name both of the executor and executrix. The said *Jeremiah Warder*, jr., has now in his hands as executor, personal property which came to his possession as executor, money or securities for money arising from the sale of the real estate, rents and profits received

Lippencott and Wife v. Warder.—Barnes v. Warder.

from the real estate, and interest or income of the personal property and proceeds of the real estate. *William Lippencott* and *Christiana* his wife have been duly appointed guardians of the person and estate of *Augusta Barnes* by the Orphans' Court in and for the county of *Philadelphia*.

The question submitted to the court is, whether the plaintiffs, that is to say, the said *William* and *Christiana*, in right of the said *Christiana*, and the said *Augusta*, are entitled by the said will to recover from the defendant the balances of money, and the securities for money which he has in his hands as aforesaid, or either and which of them? If the court shall be of opinion that they are entitled to recover, then judgment to be entered for the plaintiff. If not, judgment to be entered for the defendant.

The will was in these words:—

“I, *Barnaby Barnes*, do make this my last will and testament.

“1. I do hereby order and direct, that the formality of an inventory of my household and other personal property be dispensed with, and that the same belong to my wife.

“2. I do hereby will, devise, and bequeath, to my wife *Christiana*, and my daughter *Augusta*, and any other child or children which I may have at the time of my decease, and their heirs and assigns for ever, in equal shares, all my other estate and property real and personal. And, in the event of the death of either, the share of the party dying, to go to the survivor or survivors in fee simple; but should my children, or either of them, die leaving issue, such issue shall stand in the place of his, her, or their deceased parent.

“3. I do hereby appoint my friend *Jeremiah Warder*, jr., executor, and my wife *Christiana*, executrix of this my last will and testament, and authorize them to sell by public or private sale, and make legal conveyances in fee simple, for my real estate, should they mutually think it advisable so to do.

“In witness whereof, I have hereunto set my hand and seal, this first day of *February*, A. D. 1820.

B. Barnes.”

The case was submitted to the court without argument, by *Sergeant*, for the plaintiffs, and *M'Irvine*, for the defendant.

The opinion of the court was delivered by

DUNCAN, J. These actions are brought to decide a question between the parties, as to the right of *William Lippencott* and his wife to demand payment of the proceeds of the sale of the real estate devised to her by her former husband, the testator, and of *Augusta Barnes*, by her guardian *William Lippencott*, to receive the proceeds of the real estate of her father, the testator, sold and conveyed by the said *Christiana* and the said *Jeremiah*, under the powers vested in them by the will. *Christiana* never qualified as executrix, but executed conveyances to the purchasers,

(Lippencott and Wife v. Warder.—Barnes v. Warder.)

and the securities taken for the purchase money are to her and *Jeremiah Warder, jr.*, as executors of *Barnaby Barnes*. It is desirable to avoid, further than the case requires, giving any opinion as to what might be the construction of this will, in events that may never happen, or whether the money arising from the sale will in any event continue to be impressed with the character of real estate, and descend as such, or go to the next of kin of *Augusta*, as personal estate; but the case requires a decision on the question, and on the nature of the estate of *Christiana Lippencott*.

The testator left two children, *Augusta* and *Barnaby*. *Barnaby* died in his infancy without issue. *William Lippencott* is the guardian of *Augusta*, the surviving child of the testator, and has given satisfactory security to the Orphans' Court.

Christiana took an indefeasible estate in fee simple in one third part. The children, *Augusta* and *Barnaby*, a defeasible one. On their dying without issue, the estate went over to the survivor of them, by way of executory devise. On the death of *Barnaby* without issue, the whole fee simple in the two thirds vested in the survivor, *Augusta*. All the provisions in the executory devise relate to the children and the children's part, for there is no devise over, as to the wife's part. *Christiana*, the mother, could not die without issue, so long as either of these children lived. The object of the testator was to put his wife on an equality with the child he might leave; but he thought it wise to provide for the death of any child without issue, by giving over that child's part to the survivor or survivors. That was an event seasonably determinable. The fee simple then became vested indefeasibly in the survivor *Augusta*, of the two thirds, on the death of her brother *Barnaby* without issue. It is quite clear that *William Lippencott*, in right of his wife, is entitled to one third part of the proceeds of the sale, and that whether the money remained marked with the character of real, or became converted, to every intent, into personal property; for the wife, by joining in this action with her husband, has now consented to receive it as money. *Slifer and others v. Beates and another*, 9 Serg. & Rawle, 183. As to what may hereafter be a question, as to the descendible quality of this money, or its going over to the next of kin, on future contingencies, as relates to *Augusta's* interest, the court studiously avoid dropping any intimation; but the court is clearly of opinion, that whether *Warder* stands in the relation of a trustee, or of an executor, he would be bound to pay over any money he received, or the securities mentioned in the case stated, to the guardian of *Augusta*. The trustee could not keep it in his hands unaccounted for. If an action were brought against any of these debtors, it must be in the name of *Jeremiah Warder, jr.*, and *William Lippencott* and *Christiana* his wife, for the securities are to them. If the money was recovered and in *Warder's* hands, he would be obliged to pay *Christiana's* part to her husband, and *Augusta's*

(Lippencott and Wife v. Warder.—Barnes v. Warder.)

part to her guardian, who has given security to the Orphans' Court. If this was a proceeding in chancery, the chancellor would decree the payment, though perhaps requiring a settlement on the wife, and to the guardian on giving security. But here, the husband has never been held to make a settlement on his wife, in order to get at her estate, and here security has been given by the guardian. If it was only a life interest, and the tenant for life sought to recover the money, he could now do so, on barely filing an inventory, though formerly chancery required security that the goods should be forthcoming at his decease. *Westcott v. Cady*, 5 Johns. Ch. Rep. 349. But I apprehend it is still usual in chancery, in a case of danger, to require security. I will not pretend to say how it would be in *Pennsylvania*, as to requiring such security from a person to restore personal property devised for life. I do not know the tribunal here who could exact it. But this is not the case of a bequest for life, but a devise in fee; as to the wife's third, always a fee, absolute and indefeasible; and, as to *Augusta*, the moment she became the sole survivor; for in no event could her estate be lessened, which was a devise to her and her heirs, defeasible only on a particular event; to go over on that event to a survivor. As there now can be none on her death without issue, that event can never happen. Where the money has not been received, the plaintiffs have a right to call on *Warder* to proceed to recover the money due on the securities, or to assign them to the several plaintiffs in the proportions stated. The assignment of the securities would exonerate the defendant. Under these views of the case, it is the opinion of the court that payment to the husband of the wife's third part will be good and available, and of the part of *Augusta* to *William Lippencott*, as her guardian, and direct judgment so to be entered.

Judgment for the plaintiffs.

[PHILADELPHIA, APRIL 15, 1826.]

WICKERSHAM against NICHOLSON.

IN ERROR.

The property of an insolvent debtor passes to his trustee immediately on his assignment, and all the world is bound to take notice of it. Consequently, a payment to the debtor, the day after his assignment, by one who has not actual notice of it, is not valid.

ERROR to the Court of Common Pleas of *Philadelphia* county.

This action was originally commenced before an alderman by *Thomas Wickersham*, trustee of *Peter Pollin*, an insolvent debtor, against *Joseph I. Nicholson*, the defendant in error, and removed to the Court of Common Pleas by appeal. A declaration

(Wickersham v. Nicholson.)

in *assumpsit* containing several counts was filed, to which the defendant pleaded *non assumpsit* and payment. It was afterwards agreed by the counsel on both sides, that a special verdict should be entered in favour of the plaintiff for the sum of thirty-seven dollars and forty-five cents, subject to the opinion of the court on the following facts:

Peter Pollin was discharged as an insolvent debtor on the 11th of *October*, 1821, and made an assignment to the plaintiff and *Elizabeth Finch*, who were appointed his trustees. *Elizabeth Finch* not having given surety, and refusing to act, was afterwards removed, and the plaintiff appointed sole trustee. On the 12th of *October*, 1821, the defendant, who owed *Pollin* for boots and shoes the sum of thirty-two dollars and fifty cents, paid him in full and took his receipt. On the 14th of *January*, 1822, the plaintiff gave bond with surety, according to the act of assembly; and gave notice in the public papers of his appointment, calling upon all persons indebted to *Pollin* to make payment to him. *Pollin* had given notice of his application for the benefit of the acts, in two of the daily papers of the city of *Philadelphia* for upwards of fifteen days before his discharge.

Upon this case the Common Pleas gave judgment for the defendant, and the plaintiff took a writ of error.

Perkins, for the plaintiff in error, cited the act of the 26th of *March*, 1814, sect. 4. *Cooper v. Henderson*, 6 Binn. 190. *Stat.* 13 *El. c.* 7, s. 2. 2 *Madd. Ch.* 629, 630. *Stat.* 1 *Jac.* 1, c. 15, s. 14. *Cowp.* 569. 5 *Serg. & Rawle*, 397. 2 *Yeates*, 520. 1 *Burr.* 20. 5 *Term Rep.* 197. 2 *Dall.* 276. 4 *Dall.* 370. *Sugd. Vend.* 532.

Chew, for the defendant in error, cited, 1 *Madd. Ch.* 548. *Reeves' Dom. Rel.* 31. 1 *Phil. Ev.* 306. 1 *Gall. Rep.* 425. 1 *Com. Contr.* 437. 2 *Fonbl.* 155. 16 *Johns.* 85. 8 *Serg. & Rawle*, 497. 9 *Serg. & Rawle*, 77.

The opinion of the court was delivered by

DUNCAN, J. The only question is, whether payment to an insolvent debtor the day after his discharge and assignment, be good. The property of an insolvent debtor passes to the trustee immediately on the assignment, at the moment of assignment. *Lessee of Willis v. Row*, 3 *Yeates*, 520. In the assignment of bonds, payment before notice to the obligor, of the assignment by the obligee, is good. The assignment operates as a new contract between the obligor and assignee, commencing upon notice of the assignment. *Bury, Assignee of Binkley, v. Hartman*, 4 *Serg. & Rawle*, 176. *Jones v. Witter*, 13 *Mass. Rep.* 307. In bankruptcy, by *Stat.* 13 *Eliz. c.* 7, s. 1, 2, property in the bankrupt vested in the commissioners; from the time of an act of bankruptcy committed; and payments made by a debtor to a bankrupt, after a secret act of bankruptcy, would, under the statute, have been void. The injustice of this relation was so apparent, that Parliament, by the *Stat.*

(Wickersham v. Nicholson.)

1 *Jac.* 1, c. 15, s. 14, made such payments, until notice of the act of bankruptcy, good; but still left payments, after commission issued, as they stood under the statute of *Elizabeth*. This difference between payments after act of bankruptcy committed, and after commission issued, has always prevailed. In *Hitchcock et al. v. Sedgwick et al.*, 2 *Vern.* 162, it was decided, that every one was bound to take notice of a commission of bankruptcy when taken out; for that there was a difference where a man divested himself of his estate by his own act; and where it was taken out of him by act of parliament, whereunto all persons are supposed to be parties, and are concluded by it. In *Collet v. De Gols and Ward*, *Cas. Temp. Talb.* 69, the Lord Chancellor said, "A commission is a public act, of which all are bound to take notice, but an act of bankruptcy may be so secret as to be impossible to be known." The assignment may be well considered in the same light as a commission in bankruptcy, which is in the nature of an execution for all the creditors. *Ex parte Stokes*, 7 *Ves., jr.*, 408.

No doubt the payment in this case was a payment made without actual notice; and it is a hardship on the defendant; but the mischief would be intolerable, if the insolvent debtor the day after his assignment could go round to his debtors, receive payment, and that payment be good unless individual notice was given to each of the debtors. This divestment of his debt was by positive law, and the assignment a notorious judicial act, of which all the world was bound to take notice. It is constructive legal notice, and as binding to every intent as actual notice to the individual.

Judgment reversed, and judgment entered for the plaintiff.

END OF MARCH TERM, 1826—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

LANCASTER DISTRICT—MAY TERM, 1826.

[LANCASTER, MAY 24, 1826.]

REIGART and others *against* ELLMAKER, President of the Orphans' Court, &c., for the use of HAMILTON.

IN ERROR.

Where several distinct parcels of real property are taken at a valuation, by one of the heirs of a decedent, and a recognizance is entered into in the Orphans' Court, to secure the proportions of the other heirs, a release of one of those parcels from the lien of the recognizance, does not operate as a release of the whole. Where a judge delivers an opinion upon matter of law, he is bound by the act of the 24th of *February*, 1806, section 25, if requested, to reduce his opinion, with his reasons for it, to writing, and file it; but he is not bound to reduce to writing, *his whole charge to the jury*, and file it.

WRIT of error to the District Court of *Dauphin* county, in which the defendant in error was plaintiff, and the plaintiffs in error defendants.

The cause was argued, in this court, by *Porter, Douglas*, and *Fisher*, for the plaintiffs in error, and by *Elder*, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This was a *scire facias* issued against *John Kean*, deceased, and *Daniel Reigart* and others, terre-tenants of a house and lot once the property of *Kean*, on a recognizance to the president of the Orphans' Court of *Dauphin* county, entered into by the said *John Kean*, with condition to pay to the heirs of *John Hamilton*, deceased, their several proportions of the money

(Reigart and others v. Ellmaker.)

due to each of them for their shares of the said *John Hamilton's* real estate, appraised by order of the Orphans' Court, and taken by the said *John Kean* at the appraised value, in right of his wife *Jane*, who was one of the daughters of the said *John Hamilton*. The death of *John Kean* having been suggested on the record, a *scire facias* was issued against his widow, *Jane Kean*, for the purpose of bringing her in, to become a party to this suit, in the place of her deceased husband, of whom she was administratrix *cum testamento annexo*. This *scire facias* was served on *Jane Kean*, who made default, in consequence of which, judgment was entered against the estate of the said *John Kean*, deceased. The terre-tenants pleaded payment, with leave to give the special matter in evidence, on which issue was joined, and a verdict found for the plaintiff for six hundred and twenty-six dollars and ninety-six cents debt, with six cents damages and six cents costs, and judgment entered thereon against the house and lot, formerly the property of the said *John Kean*, and then held by the terre-tenants. Several errors have been assigned in this record, which shall be considered in their order:

1. "That there was neither plea put in, nor issue joined in this cause." The fact is not so,—there were both pleas and issues. But the record is made up in a confused manner. The *scire facias* against *Jane Kean* is docketed so as to have the appearance of a separate action. There certainly were no pleas by her, because she never appeared, and judgment was entered by default. The plaintiffs in error contended, that the jury were sworn, and the verdict given in what they call the action against *Jane Kean*. But this was a misapprehension. There was but one action, viz. a *scire facias* against *John Kean* and the terre-tenants, and, on his death, a *scire facias* issued under our act of assembly against *John Kean*, his administrator, who was to be substituted as a defendant in his place. There was therefore a regular plea and issue between the plaintiff and the terre-tenants, the only parties remaining after the death of *John Kean*, and the judgment entered against his estate on the default of his administratrix.

2. The second error is assigned, "in proceeding to trial against the terre-tenants, without a judgment having been first obtained, either against *John Kean*, deceased, or *Jane Kean*, his administratrix." This exception is not warranted by the record, by which it appears that judgment was entered against the estate of *John Kean*, for the default of his administratrix in not appearing, in pursuance of the act of the 13th of April, 1791, 3 Sm. L. 30.

3. The third error is, "in the court's opinion in bills of exceptions marked A. and B., and in their answers to the defendants' points, Nos. 1, 2, and 3; and in refusing, and neglecting to file of record, their whole charge to the jury, together with their answer to the said points, as requested by the defendants."

As to the bills of exception marked A. and B., they are out of

(Reigart and others v. Ellmaker.)

the question. It appears, on an inspection of the record, that no such bills of exception are to be found. But the defendants' points, Nos. 1 and 2, appear on the record, with the answer of the court to each of them.

First Point. "That the recognizance upon the real property accepted by *John Kean*, in *Dauphin* county, was a *joint* recognizance, and that *John Hamilton*, the plaintiff in this suit, having executed a release for a part of the property, bearing date the 14th of *January*, 1806, the whole is thereby released, and the plaintiff cannot recover in this suit."

The answer of the court on this point was against the defendants. There is an inaccuracy in calling this a *joint* recognizance. There was but *one* recognizance. But what the defendants' counsel meant, I presume, was, that this recognizance bound all the lands taken by *John Kean* at the appraisement, jointly, and did not operate as a separate lien on each particular house, or tract of land. But even if it were so, it by no means follows, that a release of the lien as to one tract, discharged it as to the whole. There can be no reason why it should be so taken: each separate parcel of property was valued separately. As far as the release went, the recognizance lost its lien, but retained it as to all the rest. It is quite different from a release of one obligor, where more than one are bound jointly in a bond. There the form of action must be joint, against all, and a plea of a release of one bars the obligee, because he must recover according to his demand, that is, against all, or he cannot recover at all. The answer of the court, on this point, therefore, was right.

Second Point. The defendants' second point was, "that as the amount due to the plaintiff, and charged on the property held by the defendants, was, on the 13th of *February*, 1818, but three hundred and seventy-nine dollars and ninety-eight cents, and it appearing by the evidence in this cause, that the plaintiff received five hundred and thirty-eight dollars and sixty-one cents for the land sold to *George Fisher*, for which a release had been executed, the same is a payment for all that the plaintiff is entitled to recover, and therefore he ought not to recover in this suit." It is evident, that this is rather a question of fact than of law. It assumes, that the plaintiff has been paid more than he demands in this suit, and therefore concludes that he cannot recover. The judge answered, very properly, that whether the plaintiff had been paid, as alleged by the defendants, was a fact to be decided by the jury, to whom he left it.

Third Point. The defendants' third point was, "that it having been proved, that the defendants were innocent purchasers for a full consideration, the court was requested to charge the jury, that the plaintiff by his release to *John Kean*, will be presumed to have received from him a full consideration for the one hundred and twenty acres of land mentioned in the said release, and that the

(Reigart and others v. Ellmaker.)

sum of twelve hundred and eighty-five dollars and three cents, paid to him by *John Kelker*, with the consideration for the said release, is a payment to him in full of all moneys due from *John Kean*, out of the house and lot for which he has brought his present suit." This point was founded also upon an assumption of facts, which the court, in its answer, says, were not proved, but that the evidence was strong to the contrary. It was submitted, however, to the jury whether the payments were made to the plaintiff, as alleged to the defendants, or not. The answer of the court was correct in all respects.

The last error insisted on by the defendants is, that the judge did not reduce to writing and file *his whole charge to the jury*, as he was requested to do. As this is a point on which the gentlemen of the bar seem to have entertained very loose and discordant opinions, it is high time that it should be settled. It was enacted by the act of the 24th of *February*, 1806, sect. 25, "that in all cases in which the judge or judges holding the Supreme Court, Court of *Nisi Prius*, Circuit Court, or presidents of the Courts of Common Pleas, shall deliver the opinion of the court, if either party, by himself or counsel, require it, it shall be the duty of the said judges respectively, to reduce the opinion so given, with their reasons therefor, to writing, and file the same of record in the cause." This provision, though undoubtedly intended for a good purpose, has produced consequences of which the legislature was not aware when it was passed. It may have done some good, but, on the whole, it is the general sentiment, that it has caused much trouble, expense, and delay, and thrown many obstructions in the way of a speedy and fair administration of justice. This court, as in duty bound, has always given it a candid, and even liberal construction, in order that the intent of the legislature might be carried into full effect. But there is no reason why we should endeavour to extend it, by equity, beyond its true meaning, which was, that when a judge delivered an opinion on matter of law, he should, if requested, reduce his opinion, with his reasons for it, to writing, and file it of record. Now, in the present instance this was done, as to several specified points, on which an opinion was requested by the defendants' counsel. But this, it seems, was not deemed sufficient. The judge was requested to reduce *his whole charge to the jury* to writing, and file it. There is nothing in the act of assembly which authorizes such a request, and the judge was very right in declining to comply with it. In a charge to the jury, the judge sums up the evidence, and lays it before them with such observations of his own as he thinks pertinent. I believe no judge reduces his whole charge to writing before it is given, and indeed he could not do it without great and ruinous delay. And after it is given, it would be impossible for a man of the most tenacious memory to recollect all that he has said on the facts of the cause. And even if it were possible, it would be improper to burthen the record with a quan-

(Reigart and others v. Ellmaker.)

tity of unnecessary matter. It is the business of the counsel who requests an opinion to be filed, to specify it. Several opinions, on matter of law, may be delivered in one charge. Some of these may be objected to, and some not; but, at all events, the judge should be informed what the opinion is, which he is desired to reduce to writing, &c., and then it is his duty to file that opinion, with his reasons, and no more. In the present case, several opinions, given before the charge, were filed at the request of the defendants' counsel, and very probably the same opinions were repeated in the charge. If so, it certainly would be improper to swell the record by a repetition of them. It appears to me, that the judge did every thing in this case which he was bound by law to do. He reduced to writing, and filed his opinion on all points of law in which he was requested to file it, but his whole charge to the jury, although requested, he did not reduce to writing and file. I am of opinion, on the whole, that there is no error in this record, and therefore the judgment should be affirmed.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

MUNDERBACH *against* LUTZ.

IN ERROR.

A judge is not bound by the act of the 24th of *February*, 1806, to file of record his *whole charge to the jury*.

Nor is he bound, at the request of the party excepting, to annex to the record a copy of the evidence taken by him, and transcribed by the party making the request. But it is the duty of the judge, if requested, to permit so much of the evidence as may be necessary to understand his opinion, to be placed upon the record. This request should be made immediately on the delivery of the opinion, and the statement of the evidence should be prepared by the counsel, and submitted to the court in the same manner as in a bill of exceptions.

ERROR to the District Court for the city and county of *Lancaster*.

Hopkins, on behalf of the plaintiff in error, moved for a rule on the judge of the District Court, "to amend his return to the *certiorari* (issued on a suggestion of diminution of the record,) by adding thereto a copy of the evidence taken by him, to be transcribed for the purpose at the expense of the plaintiff in error; and also to amend his return, by adding thereto, *his whole charge delivered to the jury, instead of, "The charge of the court, as far as it is material, was substantially as follows,"* as stated in the return to the writ of error; also, instead of the following return to the *certiorari*, "*That the whole substance of the court's charge to the jury, has already been annexed to the writ of error,*" or show cause why a *mandamus* should not issue.

(Munderbach v. Lutz.)

In support of the motion, he observed, that before the charge was delivered, the judge was requested to file it. The evidence for which the plaintiff in error asked, it was in the power of the judge to furnish without trouble to himself. He took notes of the evidence, and an offer was made that it should be transcribed at the expense of the plaintiff in error, the judge being called upon merely to annex it to the record. It was certainly the intent of the act of assembly that the evidence should accompany the judge's opinion, as without the evidence it could not be understood. It is the business of the party taking the exception to see that the facts are placed upon the record. *Downing v. Baldwin*, 1 *Serg. & Rawle*, 298. And the judge cannot be compelled to state the evidence. *Bassler v. Niesley*, 1 *Serg. & Rawle*, 431. *Id.* 472. But where he is relieved from all labour, and merely asked for the sanction of his name, a different case is presented.

The court, considering these points as already settled, declined hearing *Buchanan*, for the defendant in error.

The opinion of the court was delivered by

TILGHMAN, C. J. As to that part of the motion which respects the *filing of the whole charge delivered to the jury*, the point has been this day decided in the negative, in the case of *Reigart, &c. in error*, v. *The President of the Orphans' Court of Dauphin county*,* to the opinion in which case I refer, without repeating it. It remains to be considered, whether the plaintiff in error has a right to request of the judge, that a *copy of the evidence taken by him*, should be transcribed, and annexed to the record. By the act of the 24th of *February*, 1806, section 25, the *judge who delivers an opinion* is directed to reduce it to writing, with his reasons, and file it, at the request of either party; but he is not directed to reduce the evidence to writing, and indeed it would be a labour impossible for him to undergo. Nevertheless, it may be necessary, in order to understand the opinion of the judge, that so much of the evidence should be placed on the record, as is necessary for that purpose. But on whom does the task of reducing it to writing devolve? It is said by the plaintiff in error, that it had been already reduced to writing by the judge, and would appear in his notes, so that nothing was wanting but to annex those notes, or a copy of them, to the record. But this court has frequently protested, and particularly in the case of *Bassler v. Niesley and others*, 1 *Serg. & Rawle*, 431, against the lazy and inconvenient practice of sending up the judge's notes with the record. Indeed, it is by no means certain that these notes contain an accurate statement of all the evidence, as judges frequently omit parts, which, at the moment appear to them to be immaterial, although on reflection they might alter their opinion on that point.

* *Ante*, page 121.

(Munderbach v. Lutz.)

And certainly the counsel on both sides should have an opportunity of examining and objecting to the statement of the evidence made in the judge's notes. I think the question before us, on this motion, was expressly decided in the case of *Bossler v. Niesley, &c.* It was there said, in the opinion delivered by this court, "that in order to give the act of assembly its full effect, it would be the duty of the judge, if required, to permit the necessary evidence to be placed on the record, without a formal tender of a bill of exceptions. But this request should be made immediately on the delivery of the opinion, *and the statement of the evidence should be prepared by the counsel, and submitted to the court, in the same manner as in a bill of exceptions.* The act of assembly never could have intended to impose on the court, a labour almost impossible to be performed. That a judge should write his own opinion is proper; but that he should be obliged to make a transcript of all the evidence referred to, is unreasonable." Here, then, a plain rule was laid down, for the direction of counsel who might desire the evidence to be placed on the record. The present motion is in direct opposition to that rule. Its object is, to compel the judge, by *māndamus*, to send up a copy of his notes. It is the opinion of the court, that there is no reason for granting the motion, and therefore it should be rejected.

Mandamus denied.

[LANCASTER, MAY 24, 1826.]

LIGHTY *against* BRENNER and another.

IN ERROR.

In an action by the assignee of a promissory note against the drawer, the defendant cannot, under the plea of payment, give in evidence declarations made by the assignor, before the assignment, "that he would fix the drawer," &c. if no notice has been given by the plaintiff, that such declarations would be offered in evidence.

Where the assignee of a promissory note, drawn payable *without defalcation*, takes it with full notice of a right of defalcation, attended with circumstances of strong equity, arising between the drawer and payee subsequent to the date of the note, he takes it, (at least if the payee was insolvent at the time of the assignment,) subject to such right of defalcation.

FROM the record of this case, returned on a writ of error to the Court of Common Pleas of Lancaster county, it appeared that *Brenner and Read*, the defendants in error, brought this action of debt, not exceeding four hundred dollars, against *Henry Lighty*, the plaintiff in error, on a promissory note for three hundred dollars, dated Lancaster, November 25th, 1816, drawn by the said *Henry Lighty*, and payable to *Christian Neff* or order, without defalcation, on the 1st of April, 1817. On the 6th of January,

(Lighty v. Brenner and another.)

1817, *Neff*, in the presence of a subscribing witness, assigned all his right and title to the note to the said *Brenner* and *Read*. The defendant, having pleaded payment, with leave to give the special matter in evidence, gave notice to the plaintiffs, that he should prove on the trial, that on the 29th of *August*, 1815, *Henry Lighty*, the defendant, became bound, with *Christian Neff*, as surety for the said *Neff*, to *John Brubaker*, in an obligation conditioned for the payment of sixteen hundred dollars, on the 15th of the following *September*: That the said *John* brought suit against the said *Christian* and *Henry* to *August* Term, 1816, in the Court of Common Pleas of *Lancaster* county, and on the 23d of *August*, 1816, obtained a judgment against them for one thousand six hundred and ninety-four dollars, and forty cents, on which he issued a *fieri facias*, returnable to *November* Term, 1816, against the said *Christian* and the said *Henry*, and the sheriff returned the said *fieri facias*, "Debt, interest, and costs paid in full," all which was paid by the said *Henry* as surety for the said *Christian*, who was insolvent: That on the 15th of *April*, 1814, *Christian Neff*, *Benjamin Bear*, and *Henry Lighty*, the defendant, gave their bond to *John* and *Samuel Brubaker*, conditioned for the payment of one hundred pounds on the 1st of *April*, 1816, in which the said *Benjamin* and *Henry* were sureties for the said *Christian*: That *Michael Brubaker*, to whom the said bond had been assigned, brought suit upon it against the obligors to *August* Term, 1816, in the Court of Common Pleas of *Lancaster* county, and obtained a judgment against them for two hundred and seventy-three dollars, on which a *fieri facias* issued to *November* Term, 1816, to which the sheriff returned, "Debt, interest, and costs paid in full," all which was paid by the said *Henry Lighty* as surety of the said *Christian Neff*: That the said *Henry Lighty*, on the 15th of *April*, 1814, became surety in three other bonds, conditioned for the payment of one hundred pounds each to *John* and *Samuel Brubaker*, which became due, respectively, on the 1st of *April*, 1817, 1st of *April*, 1818, and 1st of *April*, 1819, and which were satisfied by the said *Henry Lighty*: That before the plaintiffs took the note on which this suit is brought, they called on the defendant, and were informed that he would not pay it, and had a full opportunity of examining and making inquiry into the whole transaction, which they declined, and said that if they had known it they would not have come out, and that they would return to *Lancaster* and put *Christian Neff* in jail: That they did return to *Lancaster* and arrested *Neff* on a *capias ad satisfaciendum*, and afterwards took an assignment of the promissory note in question: That the plaintiffs well knew that *Neff* was insolvent, and that the note or bill now in suit, was given through mistake, imposition, and want of consideration: That a receipt, dated the 27th of *March*, 1817, given by the attorney of *Michael* and *John Brubaker* to *Hen-*

(*Lighty v. Brenner* and another.)

ry *Lighty* for five hundred dollars, paid by the said *Henry* in the suit brought against him and *Christian Neff*, by the said *J.* and *M. Brubaker*, would also be given in evidence.

The counsel for the plaintiffs objected to the whole of the matter contained in the notice, and the court, after argument, rejected all except that part which is printed in italics; whereupon the counsel of the defendant excepted to the opinion.

The defendant further offered to prove, that *Christian Neff* had declared, before the note on which this suit is brought was given, "that he would fix *Henry Lighty*; that he would think on him as long as he lived." The counsel for the plaintiffs objected to these declarations being given in evidence, and the court having overruled them, a second bill of exceptions was tendered by the counsel for the defendant, and sealed by the court.

The jury found a verdict for the plaintiffs, for four hundred and seventeen dollars debt, with six cents damages and six cents costs.

W. Hopkins and *Hopkins*, for the plaintiff in error.

1. There is error in the verdict, because it exceeds the amount for which the writ issued. The action was debt on a promissory note, not exceeding four hundred dollars, yet the verdict was for four hundred and seventeen dollars debt. *Reed v. Pedan*, 8 Serg. & Rawle, 263. [This exception was afterwards waived by the counsel, who stated that it would be raised and argued in some other causes, which were to be heard during the term.]

2. It has always been taken for granted, that out of the city or county of *Philadelphia*, where for commercial reasons a different rule was introduced, a promissory note, even in the form of the note in question, was subject to defalcation. Not to permit the evidence to be given, of which the plaintiffs received notice, would be against all equity. The offer was to prove, that the debt and costs upon the judgments against *Neff* and the defendant, on which executions were issued, were returned, paid, by the sheriff, and that *Neff* was insolvent; from which the jury might surely have inferred, that payment had been made by the defendant. These executions were so returned before the note of the defendant was assigned to the plaintiffs. But even if the defendant had not satisfied these judgments, chancery would certainly not permit *Neff* to recover against the defendant on this note, until he had freed him from the judgments; and if *Neff* would not be permitted to recover, neither would the plaintiffs, who are indorsees with full notice, and therefore stand in no better situation than the indorser. Besides, there was direct proof of payment of five hundred dollars, prior to the institution of this suit. It cannot admit of a doubt, that notwithstanding the words, "without defalcation," there might be defalcation between the original parties to the instrument. A contrary doctrine would be extremely ruinous in the country, and the words, "without defalcation," would be but a trap for the unwary. The case of *Lewis v. Reeder*, 9 Serg. & Rawle, 193,

(Lighty v. Brenner and another.)

does not interfere with this case. The plaintiff was an innocent indorsee without notice, and this court will certainly not go further than to afford protection in such cases, to which the plaintiffs in this case have no claim. They cited, *Reed v. Ingraham*, 3 *Dall.* 505. *Act of the 27th of February, 1797*, *Purd. Dig.* 98. *Com. on Cont.* 30. *Act of 1705*, *Purd. Dig.* 177. *Act of the 28th of May, 1715*, *Purd. Dig.* 97. *Act of the 20th of March, 1810*, *Purd. Dig.* 453. *Act of the 26th of March, 1814*, *sect. 5*, *Purd. Dig.* 361. *Act of the 21st of March, 1814*, 6 *Laws of Penn.* 165. *Humphries v. Blight's Assignees*, 4 *Dall.* 370. *Cromwell's Executors v. Arrott*, 1 *Serg. & Rawle*, 183, 185, 186. *Bury v. Hartman*, 4 *Serg. & Rawle*, 187. 4 *Mass. Rep.* 370. 6 *Mass. Rep.* 428. 7 *Mass. Rep.* 58. 5 *Mass. Rep.* 334. 1 *Mass. Rep.* 1. *Chitty on Bills*, 145.

3. The declarations by *Neff*, that he would fix *Henry Lighty*, &c. ought to have been received. They certainly tended to show an intent to take a ruinous advantage of the defendant. They were therefore evidence of fraud and imposition, which, it was conceded, the defendant had a right to prove.

Rogers and *Buchanan*, for the defendants in error, when about to argue the error assigned in the verdict, were told by the court it was not necessary to speak to it.

With respect to the first bill of exceptions, they contended, that the evidence was properly rejected, 1. Because the money was not paid by the defendant until after action brought. 2. Because he had stipulated that no defalcation should be made.

1. The note was assigned to the plaintiffs on the 6th of *January*, 1817, and no money was paid until afterwards, which is sufficient to prevent a set off against the note in the hands of the assignees. But the case is much stronger for the plaintiffs below than this. It is true, judgments were obtained by *Brubaker* against the defendant below as security for *Neff*, prior to the institution of this suit, but the money was not paid until afterwards. The evidence was therefore irrelevant, for as the plaintiff's cause of action must be complete when suit is brought, so the right of the defendant to defalcation ought to be complete at the same period. 1 *Binn.* 158. *Id.* 433. 3 *Dall.* 505. The circumstance that the defendant was liable to execution on the judgments in which he was security for *Neff*, was not a matter which could be set off against the note, and there is no mode in *Pennsylvania* by which he could obtain protection on that ground. It does not appear, however, that the money was ever paid by the defendant below. The sheriff returned, "Debt, interest, and costs paid," without saying by whom, and *non constat* the payment was not by *Neff* himself.

2. The note having been made payable without defalcation, amounted to an agreement that there should be no set off, even between the original parties to the note. This, in effect, was de-

(Lighty v. Brenner and another.)

cided in *Reed v. Ingraham*, 3 Dall. 505; and in *Lewis v. Reeder*, 9 Serg. & Rawle, 193, the very point now in dispute was determined in relation to a note drawn in the same form as this, out of the city and county of *Philadelphia*. There is an obvious difference between a set off against the indorsee, and evidence (of which he had duly received notice) of fraud in obtaining the note, or mistake, which would make it void. To the latter there can be no objection; but where the parties stipulate that there shall be no defalcation, justice requires that they shall be held to their agreement.

The declarations attributed to *Neff* in the second bill of exceptions, were nothing more than loose expressions, of no weight and not proper to be brought forward to affect a third person. But, independently of this consideration, the court was right in rejecting them, because no notice was given that they would be offered in evidence.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action on a promissory note drawn by *Henry Lighty*, the plaintiff in error, payable to *Christian Neff* or order, *without defalcation*, for three hundred dollars, dated *Lancaster*, November 25th, 1816, and payable the 1st of *April*, 1817. On the 6th of *January*, 1817, *Neff* assigned all his right and title to the said note, under his hand and seal, to *Brenner* and *Read*, the plaintiffs below, who are defendants in error. The assignment was attested by a subscribing witness. The defendant pleaded payment, with leave to give the special matter in evidence. Two bills of exception to evidence were taken by the counsel for the defendant on the trial in the Court of Common Pleas. Errors have been assigned, in the opinion of this court, on each of these bills, and there was also an error assigned in the verdict, which, having been relinquished, I shall take no notice of it. The second bill of exceptions may be disposed of in a few words. The court rejected the evidence offered by the defendant, of certain declarations made by *Christian Neff*, before the giving of the note on which suit was brought, viz. "that he would fix *Henry Lighty*," &c. No such declarations were contained in the notice of special matter, given by the defendant to the plaintiffs, and therefore they could not be given in evidence. The great question between the parties turned on the first bill of exceptions. The plaintiffs denied that the matters of which notice had been given, except a particular part thereof, were legal evidence. The notice was placed at large on the record, and is in substance as follows: That the plaintiffs well knew, before they took the assignment from *Neff*, that he was insolvent, and that the note now in suit was given through mistake, imposition, and without consideration. This is the part of which the defendant was permitted to give evidence by the decision of the court. But all the rest was rejected,

(Lighty v. Brenner and another.)

viz. that "subsequent to the date of the note, and before the assignment to the plaintiffs, the defendant had paid divers sums of money, exceeding the amount of the notes for which he had been bound as security for *Neff* previous to the date of the note; and that he had also paid divers other sums of money after the said assignment, and before the commencement of this action, for which he had been previously bound as security for the said *Neff*, and for which judgment had been obtained against him: That before the plaintiffs took the assignment, they came to the defendant, and asked him whether it would be paid; whereupon he told them that he would not pay it, and offered to inform them of the whole transaction between him and *Neff*, which they declined hearing, and said, that if they had known the note would not be paid, they would not have come to him; and that they would return to *Lancaster* and put *Neff* in jail: That they did accordingly return to *Lancaster*, sued out a *capias ad satisfaciendum* against *Neff*, and had him arrested, and then took from him the transfer of this note. And that the defendant has paid several thousand dollars for the said *Neff*, which he has lost by reason of his insolvency, of all which the plaintiffs were fully apprized before they took the assignment from him." The Court of Common Pleas were of opinion, that the note having been drawn expressly payable without defalcation, the defendant was precluded from every kind of defence partaking of the nature of defalcation, although he might show that the note was void in its origin, because obtained by fraud or without consideration. This, I think, is outrunning the act of assembly, (27th of *February*, 1797,) by which nothing more was intended, than to put promissory notes dated in the city or county of *Philadelphia*, upon the same footing as commercial, negotiable paper in *England*, and in most of the other states of *America*. Before that, we had been behind our neighbours, in consequence of the decision in *McCullough v. Houston*, 1 *Dall.* 441. But it was not designed to run into the contrary extreme, by giving to notes expressed to be without defalcation, a sanctity which should in all circumstances preclude a defence which might call the validity of note in question, or show that though good in its creation, the holder ought not to recover on it. In *Cromwell's Executors v. Arrott*, 1 *Serg. & Rawle*, 180, a note payable without defalcation *on demand* was indorsed, and kept by the indorsee for fourteen months after its date, without notice of the indorsement to the drawers. In the meantime, considerable payments had been made to the payee, and it was held that these should be allowed by the holder, because he had not given notice of the indorsement in due time. Where a note is transferred in the usual course of business, without notice of any objection to its payment, the holder takes it discharged from any defence or equity which might have existed between the original parties. In *Humphries v. Blight's Assignees*, (4 *Dall.* 370,) in the Circuit Court of the

(Lighty v. Brenner and another.)

United States, it was said by Judge WASHINGTON, "that in the case of negotiable paper, he had always thought, that the assignee takes it discharged of all the equity between the original parties, of which he had no notice. But, whenever the assignee has notice of such equity, he takes the assignment at his peril." The note now in question is not within the provisions of the act of the 27th of *February*, 1797, because it is dated at *Lancaster*, and not in the city or county of *Philadelphia*. It was determined, however, in the case of *Lewis, &c. v. Reeder*. 9 *Serg. & Rawle*, 193, that a note, not within the purview of that act of assembly, if drawn expressly without defalcation, should not be subject, in the hands of a holder who came to it *bona fide* and without notice, to an inquiry into the want of consideration. But, if taken with notice, no doubt the want of consideration may be set up as a defence. Indeed, in the present instance, it was not denied, that the defendant might give evidence of any fraud or unfairness in the obtaining of the note, of which the indorsee had notice at the time of his receiving it. But it was strenuously contended, that no advantage could be taken of a right of defalcation between the drawer and payee, because the drawer had stipulated not to defalk. It is unnecessary to consider what force there would have been in this argument, if the defendant had set up a right of defalcation existing at the date of the note. The case before us exhibits a right of defalcation, attended with circumstances of strong equity, which arose after the giving of the note and before its assignment. Can it be said, that the plaintiffs, who took an assignment, with full knowledge of these circumstances, are *bona fide* holders? I think not. Being informed that the payee was insolvent, and largely indebted to the drawer, they had him arrested on a *capias ad satisfaciendum*, and then, by way of procuring payment of their judgment, obtained the assignment of this note. Can this be reconciled with principles of honesty and good conscience? On an application to chancery, I cannot but think, that the payee would have been enjoined from putting the note into circulation. The transaction has not one feature of a negotiation of paper in the usual course of business. The assignment is made under hand and seal, in the presence of a subscribing witness. It was a desperate attempt to secure the payment of a pre-existing debt, at the expense of the drawer, who was to be turned round, to seek satisfaction from an insolvent debtor. There is nothing in the case of *Lewis v. Reeder*, so much relied on by the plaintiffs, to give countenance to such a doctrine. There the paper was received, without notice of any thing to impeach it. I repeat, that I give no opinion on a case, if such should hereafter arise, where a note should be drawn payable without defalcation, and afterwards the drawer should give notice to one who was about to take an assignment of it, for good consideration, that he should set off against it, a debt due from the payee to himself at the date of the note, or even af-

(Lighty v. Brenner and another.)

terwards, the payee not being insolvent. The case before us is widely different, and contains circumstances, which, if proved to the satisfaction of the jury, ought, in my opinion, to bar the plaintiffs' recovery. There was error, therefore, in rejecting the evidence offered by the defendant, for which the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 24, 1826.]

REIGART *against* HIX and another, Administrators of
MOYER.

IN ERROR.

W. was bound as surety for *R.*, in a bond to *M.* *R.*, having brought suit against *S.*, *S.* paid to *M.* the amount due on *R.*'s bond to him, and took the bond with a view to set it off in the suit brought against him by *R.*, and an agreement was indorsed upon the bond, that the money should be repaid by *M.*, if the set off was not allowed. On the trial of the action, upon the agreement, brought by *S.* against *M.* to recover back the money paid by the former to the latter, in which the principal question was, whether the set off had been allowed, *W.*, the surety, was held not to be a competent witness for the defendant, being directly interested in the event of the suit.

THIS case was brought before the court on a writ of error to the opinion of the Court of Common Pleas of *Lebanon* county, in admitting the evidence of a certain *Thomas Wenrich*, who was offered as a witness by the defendants below, who were also defendants in error, and objected to by the counsel for the plaintiff, on the ground of interest.

The action was brought upon a writing in these words:

"Received, *April* 13th, 1816, from *Daniel Reigart*, the within bond and interest in full, which I promise to repay on demand, if not allowed at the trial. (Signed) *Jacob Moyer.*"

The following were the circumstances of the case:—One *Peter Radebach* had, on the 1st of *May*, 1814, given a bond to the said *Jacob Moyer*, conditioned for the payment of one hundred and sixty-two pounds, nine shillings and ten pence, in which the said *Thomas Wenrich* was surety. *Reigart*, the plaintiff, had purchased of *Radebach* a plantation, and given him certain bonds for the purchase money. Some one or more of these bonds *Radebach* had transferred to *J. Doll* and *J. Chase*, who brought suit in the name of *Radebach* for their use, against *Reigart*, in the Court of Common Pleas of *Dauphin* county. Before the trial of that cause came on, *Reigart* received from *Jacob Moyer* the first mentioned bond, for one hundred and sixty-two pounds, nine shillings and ten pence; and paid the full amount of principal and interest

(Reigart v. Hix and another, Administrators of Moyer.)

then due to *Moyer*, who indorsed upon the bond the writing upon which this suit was brought. The principal question on the trial was, whether *Reigart* had been allowed the amount of the bond, on the trial of the action brought against him by *Doll* and *Chase*, the plaintiff averring that it was not allowed, and the defendants that it was. The defendants called *Thomas Wenrich* as a witness, who was objected to by the plaintiff, on the ground, that being surety in the bond, he was interested in the event of the suit. After argument, the court admitted the witness and sealed a bill of exceptions.

Weidman, for the plaintiff in error, cited 1 *Phill. Ev.* 36.

Fisher, for the defendants in error. The witness was called to prove a matter in which he had no interest, viz. the consideration of the bond, and therefore he was competent. *Patterson v. Willing*, 3 *Dall.* 506. By the agreement of the 13th of *April*, 1816, between *Moyer* and *Reigart*, *Moyer* was precluded from bringing suit against *Radebach*, the principal in the bond; and if the obligee puts it out of his power to bring suit against the principal, he thereby discharges the surety. *Cope v. Smith*, 8 *Serg. & Rawle*, 112. *Rathbone v. Warren*, 10 *Johns.* 587. *United States v. Hillegas's Executors*, *Whart. Dig.* 272. pl. 13.

Wright, in reply. If the witness was interested in the event of the suit, as he clearly was, he was incompetent to give any evidence in the cause. The agreement between *Moyer* and *Reigart* could have no effect on the obligors in the bond. There was no privity between the obligors and the parties to that agreement. The obligors remained liable, and *Wenrich* was offered as a witness to prove that the bond in which he was bound as surety was satisfied. He therefore had a direct interest in the event of the suit. The object of the agreement, was to enable *Reigart* to obtain payment from *Radebach*, the principal in the bond, by discounting it against him; an arrangement greatly for the interest of *Wenrich*.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action on the case, brought by *Daniel Reigart* against the administrators of *Jacob Moyer*, deceased. On the trial of the cause, the defendants offered *Thomas Wenrich* as a witness, who was objected to by the plaintiff as incompetent on account of interest. The court admitted the witness, and an exception was taken to their opinion. Whether *Wenrich* was a competent witness is the question, and that will depend on certain facts stated in the bill of exceptions. *Wenrich* was bound as security for a certain *Peter Radebach*, in a bond for one hundred and sixty-two pounds, nine shillings and ten pence, to the said *Jacob Moyer*, of whom the defendants are administrators. *Reigart*, the plaintiff, had purchased land from *Radebach*, and given him his bonds for the purchase money. One or more of

(*Reigart v. Hix and another, Administrators of Moyer.*)

these bonds *Radebach* had assigned to two persons, of the name of *Doll* and *Chase*, who had brought suit against *Reigart*, in the name of *Radebach*, for their use. *Reigart*, supposing that if he was possessed of *Radebach's* bond to *Moyer*, (in which *Wenrich* was security,) he could make use of it as a set off in the action brought against him for the use of *Chase* and *Doll*, agreed with *Moyer* for the purchase of the said bond, on which *Moyer* gave him a writing indorsed on the bond, of which the following is a copy:—"Received, April 13th, 1816, of *Daniel Reigart*, the within bond and interest in full, which I promise to repay on demand, if not allowed at the trial, (signed) *Jacob Moyer*." The writing is not clearly expressed, but the meaning is, that unless *Reigart* could make use of *Radebach's* bond to *Moyer*, in which *Wenrich* was security, as a set off in the action brought against him in the name of *Radebach*, for the use of *Doll* and *Chase*, *Moyer* should refund the money received by him from *Reigart*. *Reigart* averred that the set off was not allowed him, and therefore brought this action against the administrators of *Moyer*, founded on the writing before mentioned. The defendants, on the contrary, asserted that the set off had been allowed to *Reigart*, on the trial of the suit for the use of *Doll* and *Chase*, and on that fact the present action turned. Now, if the plaintiff recovered in this suit, the property in the bond of *Radebach* and *Wenrich* to *Moyer*, would be revested in *Moyer's* administrators, who might recover on it against *Wenrich*. *Wenrich*, therefore, had a direct interest in the event of the present action, because, if the plaintiff was defeated, the administrators of *Moyer* could support no action against *Wenrich*, their intestate having received full satisfaction from *Reigart* for the bond in which *Wenrich* was bound as security for *Radebach*. Neither could *Reigart* support an action in the name of *Moyer's* administrators for his use, because he had received satisfaction by the set off allowed him in the action brought in the name of *Radebach* for the use of *Chase* and *Doll*. The facts are complicated, but, when fully understood, the interest of *Wenrich* in the event of this suit, is manifest. I am of opinion, therefore, that he was not a competent witness. The judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

AUG 11 1837

[LANCASTER, MAY 24, 1826.]

KELLOGG, Assignee, &c. against KRAUSER.

IN ERROR.

In a feigned issue, to try whether a judgment which had been assigned to the plaintiffs, is a lien upon the lands of the defendant, declarations by the assignor, made before the assignment, that a few days after the entry of the judgment, and when its entry was unknown to the defendant, he had paid to the assignor three hundred dollars, in consideration of which, the latter had agreed not to enter the judgment, may be given in evidence by the defendant.

Though the opinion of a witness, as to the value of land, is not strictly a fact, yet he may be asked what was the value of certain mortgaged premises, in the possession of the defendant, at the time judgment was entered against him, on the bond accompanying the mortgage.

In a feigned issue to try the validity of a judgment assigned to the plaintiff, entered by warrant of attorney upon a bond, it is not error to charge the jury, that if the person, who at the time was the proprietor of the bond, after having entered judgment upon it, had agreed not to enter judgment, and declared to the obligor that no judgment had been entered, the effect of such agreement and declaration would be, to render the judgment null and void, and that it would be a fraud to proceed on the judgment under such circumstances; provided the assignee had notice of such agreement before the assignment.

But it is not necessary, in order to be affected by the agreement, that the assignee should have notice on record, or even in writing.

Notice in any way is sufficient, provided it be full, and such as could leave the party in no reasonable doubt.

The Courts of Common Pleas have power to entertain a motion to strike off or open a judgment, or to order a feigned issue for the purpose of ascertaining necessary facts.

It appeared by the record in this case, and the papers returned with it on a writ of error to the Court of Common Pleas of *Berks* county, that *Samuel Krauser*, the defendant below, and *John Krauser*, deceased, gave a bond with warrant of attorney, to confess judgment to *Frederick Færing*, in the sum of five thousand dollars, conditioned for the payment of two thousand five hundred dollars, with interest. *Frederick Færing* assigned this bond and warrant to *Jacob K. Boyer*, who assigned them to *Rufus Kellogg*, the plaintiff. Judgment was entered by virtue of the warrant of attorney, as of *January* Term, 1823, in the Court of Common Pleas of *Berks* county. A *scire facias* on this judgment was issued to *August*, 1824. The court, upon affidavits laid before them on the part of the defendant, granted a rule to show cause why the original judgment should not be opened, and afterwards directed a feigned issue to ascertain whether this judgment was a lien on the real estate of *Samuel Krauser*, in the county of *Berks*. Accordingly, a declaration was filed, on a supposed wager in the usual form, and the parties went to trial on the feigned issue.

In the course of the trial, the defendant offered to prove, that a few days after the judgment had been entered, but when neither *Samuel* nor *John Krauser* knew of its having been entered, the said *Jacob K. Boyer* said to the said *Samuel* and *John Krauser*,

(Kellogg, Assignee, &c. v. Krauser.)

“You have paid me three hundred dollars, which we call blood money, so that I should not enter judgment on the bond, as long as the interest is paid.” The admission of this testimony was opposed by the counsel of the plaintiff, but the court overruled the objection, and an exception was taken to their opinion.

The defendant produced as a witness one *William Witman*, and proposed to ask him, “What was the value of the mortgaged premises in possession of the defendant, at the time the judgment was entered on the bond, to wit, on the 31st day of *January*, 1823?” The question was objected to by the plaintiff’s counsel, but the court permitted the witness to answer it, and a bill of exceptions was tendered to their opinion.

The court were afterwards requested to charge the jury upon the following points, viz:

1. That a judgment entered in the Court of Common Pleas of *Berks* county, becomes by the law of the land, from the time of such entry, a lien upon the defendant’s real estate in the county.

Answer. This, as a general proposition, is correct and true.

2. That an agreement between the plaintiff and defendant in such judgment, made subsequently to the entry thereof, that the plaintiff would not enter such judgment, is an agreement impossible to be performed, and therefore void in law, in regard to the entry of such judgment and the lien thereof.

Answer. If *J. K. Boyer* agreed not to enter the judgment, and declared to the defendant that no judgment had been entered, the legal effect of such agreement and declaration would be, to suspend the operation of the judgment, and render it a nullity as to the defendant. It would be a fraud in *Boyer* to proceed against the defendant on the judgment under such circumstances. Of the existence of such an agreement, the jury are to judge under the evidence.

3. That such an agreement, if actually made, would give the party who paid money in consideration thereof, a remedy to recover back the money from the party to whom it was paid, but could not in law invalidate the lien of the judgment, entered previously to the said agreement.

Answer. The recovery back of the money paid to Mr. *Boyer*, on the agreement not to enter the judgment, would be a very imperfect and inadequate remedy for the breach of the agreement; but such agreement would invalidate the judgment from the time it was made.

4. That such an agreement, made upon a condition to be performed by the defendant, gives the said defendant no legal or equitable title to relief against the lien, if the said condition be not performed, and no proof of a tender by the defendant to perform the same, be shown at the time such relief is sought.

Answer. It is for the jury to decide, whether the agreement not to enter judgment, was a conditional or an absolute agreement. If

(Kellogg, Assignee, &c. v. Krauser.)

it were unconditional, or if conditional, and the terms of it were performed by the defendant, it would be obligatory, and the defendant would be entitled to relief. But if the agreement were conditional, and the terms of it were not complied with, or offered to be complied with by the defendant, he is not entitled to the relief now sought for.

5. No such agreement, if actually made between the defendant and *Jacob K. Boyer*, the assignor of the plaintiff, but not recorded and not reduced to writing, can in law affect the plaintiff, unless notice of the terms of that agreement was given to him.

Answer. The plaintiff, *Rufus Kellogg*, ought not to be affected by the agreement, unless he had notice of it; but it is not necessary that such notice should have been recorded or reduced to writing. If *Rufus Kellogg* had notice in any way before the assignment to him, he ought to be affected by it.

Leavenworth, Hayes, and Smith, for the plaintiff in error.

1. The declaration of *Boyer* was not competent evidence, because it related to an agreement subsequent to the entry of the judgment, and because it was not proved that *Kellogg* had notice of the agreement. An agreement not to enter a judgment which has been already entered, cannot by any possibility be carried into effect, and therefore is void. The party injured may recover back the money paid on a void consideration, but the validity of the judgment cannot be affected. It is valid until reversed. 1 *Salk.* 400. 3 *Salk.* 214. 5 *Com. Dig. Pleader*, 2, 9. *Lewis v. Smith*, 2 *Serg. & Rawle*, 142.

2. The answer which the court below permitted the witness to give to the question, "What was the value of the mortgaged premises at the time the judgment was entered?" was irrelevant to the issue, and therefore inadmissible. It tended to prejudice the jury against the plaintiff, by inducing them to think that the plaintiff, who purchased the mortgaged premises, had got the value of his debt. It was, at best, but an abstract opinion, and not a fact, and therefore not evidence. 1 *Phill. Ev.* 126. 1 *Serg. & Rawle*, 298. *Forbes v. Caruthers*, 3 *Yeates*, 527.

3. The court erred in saying, that if *Boyer* agreed not to enter judgment on the bond, it would be a fraud in him to proceed upon the judgment, which by the agreement was a nullity. If the condition of an obligation be, to do a thing *impossible*, the obligation is single. 1 *Powel on Cont.* 159, 161.

4. The court did not distinctly answer the fifth proposition submitted to them. The jury must have inferred, from the language of the court, that if the plaintiff had notice of the agreement, in any manner, no matter how vague and loose, it was sufficient to bind him. This was clearly wrong. At least it may be said, that the charge on this point was obscure; and if the court give obscure instructions to the jury, it is erroneous. *Fisher v. Larick*, 3 *Serg. & Rawle*, 319. Besides, the defendant might have had

(Kellogg, Assignee, &c. v. Krauser.)

redress, by pleading the agreement in bar to the *scire facias*, and therefore he was not entitled to avail himself of it in this issue. 6 *Bac. Ab.* 123. 1 *Serg. & Rawle*, 540. 5 *Serg. & Rawle*, 68.

5. The Court of Common Pleas had no power either to entertain a motion to set aside the original judgment, or to direct a feigned issue. *Davis v. Barr*, 9 *Serg. & Rawle*, 137.

Biddle and *Buchanan*, for the defendant in error.

1. In the order of things, the agreement should be proved first and the notice afterwards. Some evidence, however, of notice had been given before any evidence was offered of the agreement. After this evidence had been given, by permission of the court, further evidence of notice was given, previous to the delivery of the charge.

2. (The court informed the counsel, that it was unnecessary to speak to the matter contained in the second bill of exceptions.)

3. The third objection urged by the counsel for the plaintiff in error, goes to the charge of the court, delivered after evidence had been given, which does not now appear, and which it was the business of the party excepting, to place upon the record. The charge was, that if *Boyer* deceived the defendant as to the entry of the judgment, he should derive no advantage from it; and can there be a doubt that this charge was perfectly right? To leave the defendant to seek redress against *Boyer*, on the agreement, on the ground that the performance of the agreement on his part was impossible, would be a disgrace to the administration of justice. Chancery would interpose, and even a court of law would interfere in a summary way to give relief. In a clear case, a court of law will order a perpetual stay of execution, or will stay the execution until the defendant has time to go into chancery. 15 *Johns.* 396. 16 *Johns.* 4.

4. The court was requested to charge, that notice of the *terms* of the agreement should have been given to the plaintiff; and the charge was, that notice of the *agreement* should have been given. Surely there is no substantial difference between what was required by the counsel, and the answer given by the court. The plaintiff could not have known the agreement, without a knowledge of its terms. The judge said, that notice in *any way* was sufficient; that is, whether recorded, or by writing not recorded, or simply by parol; but there is nothing in his language to authorize an inference that he considered any vague indefinite notice binding upon the plaintiff. It does not appear on the record, that the plaintiff requested this charge to be filed; and whether, in such a case, it is the subject of a writ of error, is a point of considerable importance.

5. That the court below had no power to entertain a motion to open a judgment, or to direct an issue, is novel and alarming doctrine. It is sufficient, that both parties joined in framing this issue, and therefore neither can object to it. But that the court have the

(Kellogg, Assignee, &c. v. Krauser.)

power to direct an issue, in order to come at the truth of a matter, through the medium of a jury, the only proper tribunal for the trial of facts, is too plain to admit of argument. Such issues are frequently ordered, and to say that the courts have no power to direct them, is to give the greatest encouragement to fraud, by taking away the power to restrain it.

The opinion of the court was delivered by

TILGHMAN, C. J. Several bills of exception were taken by the counsel for the plaintiff, in the course of the trial of this cause, which we are now to consider.

1. The court admitted evidence, on behalf of the defendant, of *Boyer's* confession before he assigned to *Kellogg*, that a few days after the entry of the judgment, and when its entry was unknown to the defendant, he paid to the said *Boyer* three hundred dollars, in consideration whereof *Boyer* agreed not to enter judgment on the bond, as long as the interest was regularly paid. The main argument urged by the plaintiff's counsel, against this evidence, is, that the agreement was impossible to be performed, because the judgment had been already entered, and therefore the defendant should be left to his action against *Boyer* on the agreement. But this might be a very inadequate remedy, especially if *Boyer*, as alleged by the defendant, was and is in very doubtful circumstances. The three hundred dollars paid by the defendant, were, it is supposed, over and above the two thousand five hundred dollars, the principal of the bond, and were what *Boyer* called *blooa money*. It was a gross fraud to take this money from the defendant, under an agreement not to enter judgment, when judgment had been previously entered. And the Court of Common Pleas would have been justified in ordering the judgment to be erased from their record, on clear proof of the fact. But they did not choose to decide the fact themselves, and therefore directed an issue. Another reason urged by the plaintiff against the evidence is, that the defendant might have pleaded the agreement with *Boyer*, in bar of the *scire facias*. But this is by no means certain, and besides the Court of Common Pleas may, in their discretion, interfere in a summary way, and order an issue, even though the defendant might possibly have obtained redress in another manner. A court of chancery, on proof of the fraud practised by *Boyer* on the defendant, might have enjoined him against proceeding on the judgment, and the Court of Common Pleas, having ascertained the fact, may give relief in some manner equivalent to an injunction. I am of opinion, therefore, that there was no error in admitting the evidence.

2. The second bill of exceptions, was, to the court's permitting the defendant to ask *William Witman*, one of his witnesses, and in permitting the witness to answer, the following question:—
“What was the value of the mortgaged premises, in the possession

(Kellogg, Assignee, &c. v. Krauser.)

of the defendant at the time that judgment was entered on the bond?" It seems that the defendant had given a mortgage on real property as a security for the payment of his bond, which property had been sold, and the proceeds applied, as far as they would go, to the payment of the bond; but they were insufficient to discharge the whole. The principal reason assigned by the plaintiff against this evidence, was, that *an opinion* of the value of land is not evidence, because it is not a fact. It is certain that such opinions are every day received as evidence, although it is true that an opinion is not strictly a fact; and it is difficult to conceive how the value of land can be proved without them. The witness may indeed prove the prices at which other lands in the neighbourhood were sold; but that would not ascertain the value of the land in question, without a comparison between it and the land which was sold, as to quality; and quality is very much matter of opinion. It is a kind of evidence so commonly admitted without dispute or objection, that I have no doubt of its legality.

3. The third exception was, to the charge of the court, (in answer to the second proposition of the plaintiff's counsel,) "that if *Boyer* agreed not to enter judgment, and declared to the defendant that no judgment had been entered, the effect of such agreement and declaration would be to render the judgment null and void; and it would be a fraud to proceed on the judgment under such circumstances."

That it would be a fraud to proceed on the judgment under such circumstances, cannot be doubted. And as to the court's saying, that the judgment was rendered null and void by the agreement, the objection seems to be a dispute about words rather than substance. In strict propriety of speech, the judgment was not rendered null, because it required the judgment of the court to avoid a judgment regularly entered, as this was. But the agreement afforded ground for the court's ordering the judgment to be stricken out, which would amount to the same thing. The dispute concerning the lien of this judgment is between the obligor, against whom judgment was entered, and the plaintiff *Kellogg*, who was an assignee *with notice*. At least, so the plaintiff alleged, and whether he had notice or not was submitted to the jury, as appears in another part of the case. I take the object of this feigned issue to have been, to ascertain facts from which the Court of Common Pleas might be enabled to decide whether it was proper to strike out the judgment or not. I do not think, therefore, that there was any error in this part of the charge.

4. I say nothing as to the fourth error, because it depends on the principle decided in the first.

5. The fifth exception is to the following part of the charge of the court (in answer to the plaintiff's fifth proposition.) "The plaintiff, *Rufus Kellogg*, ought not to be affected by the agreement, unless he had notice of it. But it is not necessary that such

(Kellogg, Assignee, &c. v. Krauser.)

notice should have been recorded, or reduced to writing. If he had notice, *in any way*, before the assignment, he ought to be affected by it." It is not contended that the notice must be recorded, or even reduced to writing. The objection is to the words, "*if he had notice in any way*," which, in the opinion of the plaintiff's counsel, may be extended to any kind of loose, vague, hearsay, imperfect information. If I could agree to that construction of the charge, I should say that it was clearly erroneous. The notice ought to be full, and such as could leave the party in no reasonable doubt. But when the judge told the jury that *Kellogg* could not be affected unless he had notice of the agreement, it ought to be understood, notice of the whole agreement. To give the words a more restrained construction, would be criticising beyond the bounds of candour. And when the judge added, that notice, *in any way*, would be sufficient, I should suppose that he meant, notice *by parol*—notice neither placed upon record, nor even reduced to writing. Thus understood, the charge was correct.

7. and 8. The seventh and eighth exceptions are, that the court erred, in entertaining the motion of the defendant below, to open the original judgment; and that they erred in directing a feigned issue, to ascertain whether the said judgment was a lien or not upon the defendant's real estate in *Berks* county.

I must premise, that the object of these exceptions is not properly before this court. What we have to do is to decide, whether there was error in any thing that occurred on the trial of the feigned issue. That is, in form, a complete action, unconnected with the motion to open the judgment, with which we have no concern. But I hope it is not now a matter of doubt, whether a Court of Common Pleas can entertain a motion to strike out, or open a judgment entered on a warrant of attorney, or to order a feigned issue for the purpose of ascertaining necessary facts. If it has not this power, miserable indeed is our condition. It is the first time I have heard it questioned. It is, and has been, for the last half century, at least, an undisputed and constant practice. Great frauds are often committed under colour of these bonds and warrants, and necessity requires that they should be investigated in a summary way. In some of the states they are absolutely prohibited, on experience of the abuse made of them. And they could be no where tolerated, without the exercise of a liberal discretion by the courts, in inquiring into them. Feigned issues should be encouraged, because without them the court must draw the trial of all facts to itself. Suppose a case of complicated fraud, disclosed by affidavit. It may depend altogether on matter of fact. And is it not much more agreeable to the spirit of our laws and constitution, that this should be referred to a jury, than tried by the court? And even if fact were intermixed with law, is there not a great advantage in a mode of trial, by which the opinion of the court, on points of

(Kellogg, Assignee, &c. v. Krauser.)

law, can be reviewed by a superior tribunal? If the court decides the whole, on motion, I know of no redress in case of error. But should there be a mistake in the admission, or rejection of evidence, or in charging the jury on a feigned issue, a writ of error lies.

I am of opinion, in this case, that the plaintiff in error has not supported any of his exceptions, and therefore the judgment should be affirmed. The record is to be remitted, and the Court of Common Pleas will then make such order as shall seem proper, on the motions which have been made, or may be made, touching the original judgment.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

GRATZ and others, Administrators of GRATZ, *against*
PHILLIPS and others.

IN ERROR.

A writ of error does not lie on a decision of the court below, setting aside an award of referees, on exceptions founded both upon law and fact, though the award was set aside exclusively upon the points of law, without reference to the exceptions founded in fact.

Whether an award shall be sent back to be corrected by the referees, is a matter which rests in the discretion of the court below, and in which this court has no right to control them.

If several trustees, who have separately received money, agree to enter into an amicable reference, as defendants, and stipulate, "that no advantage shall be taken as to the form of suit, or the liability of the parties in it," an award against them *jointly* is good.

ON a writ of error to the Court of Common Pleas of *Lancaster* county, it appeared that this was an amicable action, in which *Simon, Joseph, and Jacob Gratz*, administrators of *Michael Gratz*, deceased, were plaintiffs, and *Levi and Leah Phillips*, and *Beliah Cohen*, defendants, entered on a written agreement in the following words:

"We agree, that the above action be entered in the Common Pleas of *Lancaster* county, of the Term of *January*, 1822; and we do hereby refer all matters unsettled and at variance between the parties, to *Caspar Shaffner, jr., John Reynolds, and Joseph Ogelby*, or to a majority of them; to meet at the house of Colonel *Jacob Slough*, in the city of *Lancaster*, at any time the parties shall agree upon, upon thirty days' notice, and to make their award into the prothonotary's office, with power to adjourn from time to time until the cause shall be decided. And it is agreed, that the arbitrators shall have no power in relation to any lands unsold at the time of instituting this suit, and that no advantage shall be taken by either party as to the form of suit or the liability of the

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

parties in it, and that the award and judgment be final. Witness our hands this 29th of *January*, 1822."

The arbitrators consented to act, met, and heard the parties, and after considering the arguments and proofs on each side, made the following award on the 8th of *August*, 1822:

"*Thursday, May* 30th, 1822, the arbitrators met at the house of *J. Slough*; and adjourned till the 13th of *June*, 1822, when the arbitrators and parties met and proceeded in the cause. And, after hearing the parties, on the 8th of *August*, 1822, reported, that after an attentive hearing of the parties, their proofs and allegations, and after a careful examination of the evidence submitted to them, do now find for the plaintiffs the sum of five thousand two hundred and eleven dollars, and sixty-one cents, arising out of the sales of land, as far as the accounts of sales for the same have been furnished to the arbitrators.

"They also find the sum of eighteen hundred and thirty-nine dollars, and eighty-six cents, to be due to the plaintiffs, being the half of the amount of the sales of land now outstanding, as far as the same have been exhibited to the arbitrators; which sum, of eighteen hundred and thirty-nine dollars, and eighty-six cents, to be paid to the plaintiffs, as the same shall come to the hands of the defendants.

"The annexed paper, marked A., containing the amount of the sales of land, upon which the award is made, and exhibiting the amount of sales outstanding, the arbitrators desire may be considered as a part of their award."

The paper marked A. was appended to the award, but it is not necessary further to state its contents.

To this award, the counsel for the defendants filed thirteen exceptions, of which eleven were on the facts and merits of the case, and the following two on matters of law.

Eleventh Exception. Because the referees have erred in giving a general award against all the defendants, when in fact *Levi Phillips* was the only defendant who received any of the sums stated; and there was no evidence before them that any of the other defendants received any part thereof.

Thirteenth Exception. Because the award is neither certain nor final.

The Court of Common Pleas, after argument, delivered the opinion which follows, and set aside the award; and on this decision, the cause was brought by writ of error before this court.

OPINION. We have carefully considered all the exceptions filed to the award in this case, and the documents referred to in the argument. From the view which we have taken of it, it is only necessary to deliver an opinion upon the eleventh and last exceptions, which appear to be fatal to the confirmation of this award. There is no point better settled, than that an award should be certain and final.

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

The arbitrators to whom this cause was referred, have found for the plaintiffs the sum of five thousand two hundred and eleven dollars, and sixty-one cents, arising out of the moneys actually received for the sales of lands, as far as the accounts of sales for the same have been furnished to the arbitrators. They also find the sum of eighteen hundred and thirty-nine dollars, and eighty-six cents, to be due to the plaintiffs, being the half of the amount of sales of land now outstanding, as far as the same have been exhibited to the arbitrators; which sum of eighteen hundred and thirty-nine dollars, and eighty-six cents, to be paid to the plaintiffs as the same shall come to the hands of the defendants. A paper is annexed to the record, marked A., containing an account of the sales of land upon which the award is made, and exhibiting the amount of sales outstanding, which the arbitrators desire may be considered a part of their award. *With respect to the sum of eighteen hundred and thirty-nine dollars, and eighty-six cents, all is uncertain and inconclusive. It relates to moneys to be collected in future. No time is fixed at which the defendants become responsible—no mode determined of ascertaining when the moneys are received, or what amount may be paid in; nor have the plaintiffs any remedy for enforcing the payment of what may be collected.*

We cannot give judgment for the five thousand two hundred and eleven dollars, and sixty-one cents, because it is admitted that there are errors, which will reduce that sum to a lower amount.

But admitting that the award may be confirmed as to the sum of five thousand two hundred and eleven dollars, and sixty-one cents, and rejecting the rest, it appears to us, that *there is no removing the difficulty occasioned by the eleventh exception, viz. that the referees have erred in giving a general award against all the defendants, when there was only one who received any of the sums stated; and there was no evidence before them that either of the other defendants received any part of them.*

We have considered the agreement under which the reference took place, and have given full weight to the arguments founded upon that part of it, which says, that no advantage shall be taken by either party, as to the form of suit or the liability of the parties, and are of opinion, that *whatever might be the motive for introducing this stipulation, it will by no means admit of such a construction as to render liable either of the defendants to the payment of any money which it may clearly appear he has never received, and for which in law he is not responsible.*

Beliah Cohen received no part of the money in dispute, and yet there is no distinction in the award, between her and the other defendants. In this, therefore, there is manifest error, and the award must be set aside.

June 10, 1824.—Judgment by the court, that the award be set aside.

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

Before the counsel for the plaintiffs in error began their argument, *Rogers* moved to quash the writ of error, because no final judgment was given in the court below; upon which the court desired the counsel for the plaintiffs in error to speak, both to the exceptions to the award, and to the motion to quash the writ of error.

Montgomery and *Norris*, for the plaintiffs in error.

1. A writ of error undoubtedly lies in a case like this. The court gave a final judgment on the award. Their authority was derived from the act of 1705, which by long practice has been extended greatly beyond its letter, and under which all kinds of subjects and every variety of action may be referred. There is a great difference between a reference of an action pending, and an agreement, like the one under consideration, to enter an amicable action, in which case the parties are in court, only for the purpose of having their agreement carried into effect, by a trial by arbitrators, without adopting any particular form of action. A judgment setting aside the award of arbitrators, made under such circumstances, is therefore like a decision arresting a judgment, on which a writ of error lies. An agreement to enter an amicable action, with a view to a decision by arbitrators, cannot be converted into a trial by jury, nor can it be subjected to the rules which govern ordinary cases. If the cause be remitted, the plaintiffs cannot obtain a judgment against the defendants by default, on their not complying with a rule to plead. By the judgment that the award be set aside, exclusively on matters of law, an end was made of the case. An award under the act of 1705, does not resemble a verdict. It need not be as formal, and may be carried much further. It may be enforced by judgment or attachment, as the case may require. A balance may be found for the defendant, which, being recorded, a *scire facias* may issue upon it. Suppose a balance to be found in favour of the defendant, and set aside by the court; if a writ of error does not lie upon their decision, the defendant is injured and without remedy, for the plaintiff may discontinue his action. But even if the cause should come to trial by jury, the plaintiffs must lose the advantage of one main part of the agreement, viz. that the defendants should be jointly liable for what had been received by either of them. *Act of 1705, 1 Sm. L. 50. Ebersoll v. Krug, 3 Binn. 528. 2 Serg. & Rawle, 363. 3 Yeates, 479. 3 Binn. 432. Addison, 119, 121. 4 Serg. & Rawle, 231. 12 Johns. 31. Mussey v. Thomas, 6 Binn. 333. Galbreath v. Colt, 4 Yeates, 551. 1 Dall. 164. Act of the 28th of March, 1806, 4 Sm. L. 326. 3 Bl. 292. 3 Johns. Ch. Rep. 64.*

2. The exceptions, both as to law and fact, were before the Court of Common Pleas, who examined parol evidence, and then decided upon the eleventh and thirteenth exceptions alone, which were purely matters of law. The conclusion therefore must be, that the court did not think the award could be impeached on any other

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

points. In considering these exceptions, this court will apply the rule, that a liberal construction is to be given to awards, in order to support them. The opinion of the Court of Common Pleas, that the award was bad, because it charged Mrs. *Cohen* with money, not received by her but by *Levi Phillips*, was erroneous. *Joseph Simon* was trustee for the plaintiffs for certain lands, and by his will delegated his power to *Levi Phillips*, and his daughter, the wife of *Levi Phillips*, and to Mrs. *Cohen*. *Simon* could not, by his will, divide the responsibility of his executors. They were all liable, jointly, for the money received by any of them, just as *Simon* himself would have been answerable for all the money received by him, if he had received any. They made, together one trustee, answerable for each other's acts. The agreement was entered into upon the principle of joint liability. The object was to make an end of long protracted disputes, which experience had shown could be done only by arbitration, and an agreement was entered into by which all form was waived, and the defendants expressly consented to be liable for the money received by each other. If the cause should be remitted for trial to the Court of Common Pleas, the plaintiffs could not, on a declaration for money had and received, recover against each of the defendants what each had received. They would recover against them jointly, or not at all. Where two trustees join in the sale of land, and a receipt for the money is given by both, both are (*prima facie*, at least,) liable, though the money be received by only one. 2 *Johns. Ch. Rep.* 560. *Buckley v. Ellmaker*, 13 *Serg. & Rawle*, 71. *Kyd on Awards*, 26, 35.

3. The opinion of the court, that the award was not certain and final, is likewise erroneous. There are upon the face of the award two errors, which always were and still are admitted; one of ten dollars in the addition, and another of two hundred and two dollars and thirty-three cents, in the charge of interest. These, however, are merely clerical errors, as appears by the account accompanying the award. They are errors which may be corrected, and do not vitiate the award *in toto*. 4 *Serg. & Rawle*, 322, 328. 4 *Yeates*, 336. 5 *Serg. & Rawle*, 51, 55, 56. 6 *Binn.* 36. 2 *Johns. Ch. Rep.* 551. 4 *Johns. Ch. Rep.* 405. *Kyd on Awards*, 194, 198, 201, 202, 205. The circumstance that no time was fixed for the collection and payment of the sum of eighteen hundred and thirty-nine dollars and thirty-six cents, is no objection to the award, because every thing was reduced to certainty by the annexed account, stating each tract sold, the money received on account of each, and consequently the balance due upon each. Of this, payment can be enforced, at the proper times, either by attachment, *scire facias*, or action on the case. It is, in some degree, analogous to an award ordering a stay of execution until something be done by the plaintiffs, which is good. 3 *Yeates*, 149. But, even if this part of the award was bad, as respects the sum of five thousand

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

two hundred and eleven dollars, and sixty-one cents, it was beyond a doubt certain and final, and this is not so connected with the other sum, as that judgment might not have been given for one without the other. If it be objected, that the award is not final, because it does not settle all accounts between the parties, the answer is, the law is now settled, that it is sufficient if the referees decide upon all the accounts which are brought before them.

Rogers, for the defendants in error.

1. No precedent can be produced of a writ of error in a case like this. If the award had been confirmed and judgment entered for the plaintiffs, error would have lain upon the judgment; but not so where the award is set aside. By the act of 1705, 1 *Sm. L.* 50, the award is to be approved by the court, before judgment can be entered upon it, and, when approved, it has the effect of a verdict. Exceptions to an award of referees, is an appeal to the discretion of the court, and resembles a motion for a new trial. 7 *Serg. & Rawle*, 285. This case, then, stands as if there had been a verdict which the court set aside; and no writ of error lies where the court orders a new trial. If a new trial is moved for on eleven objections founded on fact and two on law, and it is ordered on one of the points of law, no writ of error lies, because the action is not ended. 1 *Day*, 27. *Arch. Pr.* 208. To be the basis of a writ of error, a judgment must be final and not interlocutory. The only exception to this rule is the case of real actions, where, on default, the plaintiff recovers the land at common law, and there is a statute which gives damages. In such case, error lies on the judgment by default. The setting aside the award was in the nature of an interlocutory judgment. It did not make an end of the cause, and consequently was not the subject of a writ of error. The plaintiffs may file a declaration, and lay the defendants under a rule to plead; and if a plea be entered, the whole case may be brought to trial before a jury. In many cases a writ of error lies upon the decision of the court in one way, where it does not, upon a decision the other way; and whether or not the decision puts an end to the case, is the criterion. It lies upon an order of the Common Pleas, dismissing an appeal from a justice of the peace; but if the appeal is sustained, error does not lie until the end of the suit. 3 *Binn.* 432. The Common Pleas first struck off an appeal, and then reinstated it: a writ of error does not lie upon the order for reinstatement. 2 *Serg. & Rawle*, 382. It lies on an order to arrest a judgment, 2 *Serg. & Rawle*, 390, 394; but not on an order setting a judgment aside. 5 *Serg. & Rawle*, 516. It lies on a decision sustaining a demurrer, but not on a decision against it. It lies on a judgment of nonsuit; *secus* on a refusal to nonsuit. 2 *Johns.* 9. 6 *Johns.* 110. 7 *Johns.* 373. It does not lie on an order of court for the discharge of a jury. *Eichelberger v. Nicholson*, 1 *Serg. & Rawle*, 430. There are eleven exceptions founded in fact, which appear upon the record. If the court below had set

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

aside the award upon any of these, this court would not sustain a writ of error, because it cannot receive any evidence which is not in the record. The court below gave no opinion upon the exceptions in fact, though that court was competent to examine the evidence in relation to them; and now the plaintiffs ask this court to give judgment on the award, which is equivalent to asking them to decide against the defendants on the eleven exceptions in fact, without examining into their merits, and without possessing the power to do so. They ask, too, to have a judgment upon the award for five thousand two hundred and eleven dollars, and sixty-one cents, when it not only appears from the record that so much is not due, but when the defendants distinctly admit that it is not due. This admission appears from the opinion of the court below filed at the request of the plaintiffs. It is admitted that there are errors which would reduce that sum to a lower amount; but what would be the amount, or on which of the defendants' exceptions the admission is founded does not appear. The error with respect to a charge of interest for thirteen instead of three years, was not a clerical error; but one of judgment. An award may be sent back for informality, but otherwise it cannot be sent back without the consent of parties, or perhaps the request of the referees. *Shaw v. Pearce*, 4 Binn. 486. 4 Yeates, 336. If this court does not give judgment for the whole sum of five thousand two hundred and eleven dollars, and sixty-one cents, which it is admitted would be wrong; for what sum can it give judgment? No satisfactory answer can be given to the question.

2. The court below has said that Mrs. *Cohen* received no part of the money, and this must be taken to be the fact. In *Pennsylvania*, courts inquire into matters of fact on exceptions to an award of referees. But a court of error has no power to do so. We must therefore receive for fact what is stated in the record. 1 *Dall.* 315. 1 *Yeates*, 353. 2 *Yeates*, 513. 7 *Serg. & Rawle*, 285. If Mrs. *Cohen* received none of the money, she is answerable for none; for one trustee is not answerable for money received by another, except under very special circumstances; and whether or not such circumstances existed, is matter of fact, on which the court below has decided in favour of Mrs. *Cohen*. 2 *Fonb.* 180. 1 *P. Wms.* 81, 242. 2 *Vern.* 750. *Amb.* 219. 21 *Vin.* 534. 1 *Dall.* 311. This question is, as respects Mrs. *Cohen*, extremely important. The award subjects her personally to the whole amount found due from the defendants, when she never received any part of it. The agreement to enter this suit, never contemplated such joint liability, and it is a monstrous perversion of his intention so to construe it. The object in introducing the clause under consideration, was to remove a difficulty as to a suit against *Leah Phillips*, the wife of *Levi Phillips*; because a married woman is not bound by a submission to arbitration. *Kyd on Awards*, 35. The true construction of the agreement is, that the defendants were lia-

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

ble severally for what each had received, and that the plaintiffs might recover accordingly; and this the defendants are willing to abide by, if the cause should go to trial again.

3. The award was not certain and final. The submission was under the act of 1705, and the award ought to be so certain that judgment may be entered on it. It is, that a certain sum, viz. five thousand two hundred and eleven dollars, and sixty-one cents, is due to the plaintiffs, *so far as the account of sales have been furnished to the arbitrators*; so that the defendants would be left exposed to a future action by the plaintiffs. It did not make an end of all matters unsettled and in variance between them. But there is another part of the award on which there is no possibility of entering judgment. It is that part of it which awards to the plaintiffs eighteen hundred and thirty-nine dollars, and eighty-six cents, *to be paid when collected by the defendants*. The referees had no right to charge the defendants with money they had not received, and particularly when it could not be known by which of them it would be received. The award could not be enforced; for by the act of 1705, the plaintiffs cannot have judgment for part and an attachment for part.

The opinion of the court was delivered by

TILGHMAN, C. J. From the nature of this case, the plaintiffs in error have considerable difficulties to encounter. This court is asked to reverse the judgment of the Court of Common Pleas, and to affirm the award. Now it is not denied, that the Court of Common Pleas had a right to set aside the award, not only because it was against law, but even on consideration of the merits of the case. The act of 1705, under which this reference was made, gives to the award the effect of a verdict, *provided it be approved of by the court*, and the court have always exercised the right of examining the award and setting it aside, not only for errors in law, but for manifest errors in fact. If it is set aside, on a consideration of facts, the decision cannot be called in question on a writ of error, because the court of error have not the facts before them. It is true, that, in the present instance, the opinion of the Court of Common Pleas seems to have been founded principally on errors in law, specified in the eleventh and thirteenth exceptions. But it does not rest altogether on matter of law, because, in the opinion of the court, placed on the record, it is expressly said, that they cannot give judgment for the sum awarded, *because it is admitted that there are errors, which will reduce that sum to a lower amount*. That being the case, it is clear, that independently of the errors in law pointed out in the eleventh and thirteenth exceptions, there were errors in fact, affecting the merits of the case, which rendered it necessary to set aside the award. Besides, there are eleven other exceptions, founded on the merits of the case, on which no decision has been given, and should this

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

court affirm the award, the defendants will be deprived of the benefit of those exceptions, on which the Court of Common Pleas have never given an opinion, and on which it is impossible for this court to form an opinion, because the evidence is not, and never can be legally brought before them. It was contended by the counsel for the plaintiffs, that the errors in fact, which the Court of Common Pleas say were confessed, were no more than clerical errors, and that the award ought to have been sent back to the referees to correct them. But it does not appear to us, that they were clerical errors, and as to sending the award back, to be corrected by the referees, that is a matter which must rest in the discretion of the Court of Common Pleas, and in which we have no right to control them. I cannot perceive, therefore, any safe ground for reversing the judgment by which this award was set aside. But still, there is one point of law, on which the Court of Common Pleas gave an opinion, and of which it is of importance to the parties that the opinion of this court also should be expressed, because the same point may hereafter occur. I allude to the point specified in the eleventh exception, viz. "that the referees have erred in giving a general award against all the defendants, when, in fact, *Levi Phillips* was the only defendant who received any of the sums stated; and there was no evidence before them that any of the other defendants received any part thereof." The opinion of the Court of Common Pleas was, that upon the true construction of the agreement for entering the amicable action, each defendant was responsible for the money received by him, or her, and no more. I am of opinion that this is not the meaning of the agreement. The words are, "that no advantage shall be taken, by either party, as to the form of suit, or the liability of the parties in it." It seems, then, the parties were aware, that without this agreement, there would have been difficulty in supporting the plaintiffs' claim, in this form of action. Now, the form of action is a joint action against three defendants, in which a joint judgment must be given. It would be error to give judgment against one defendant for a sum of money, and against another for another sum. The defendants were executors and trustees under the will of *Joseph Simon*. Large sums of money were to be collected for lands sold, and on general principles one trustee would not be responsible for collections made by another. These parties had been at law for some time, and being weary of the contest, they were anxious to put an end to it by a reference. To simplify the proceedings, it was agreed that one suit should be brought against the three defendants, and the liability of both parties to the performance of the award to be made by the referees, was confessed. It is said to be unreasonable that one trustee should be responsible for money received by another. It is so, unless it be so agreed, and then it is not unreasonable. In the present instance, it may be presumed, that the defendants, who agreed to be jointly responsi-

(Gratz and others, Administrators of Gratz, v. Phillips and others.)

ble, had an understanding between themselves by which justice would be done. That was their affair, but the plaintiffs had nothing to do with it. The only question between the plaintiffs and defendants is, whether the defendants did not agree to make themselves jointly responsible in this action; and, that they did so, appears to me so plain that I am at a loss for an argument to prove it. The words speak for themselves. A joint action is to be instituted against three persons, who expressly stipulate "that no advantage shall be taken either as to the form of suit, or their liability." I am of opinion, therefore, that the referees were right in awarding, that the sum due to the plaintiffs should be paid by the three defendants jointly; and the construction given to the agreement, by the Court of Common Pleas, was erroneous. But in setting aside the award, I can perceive no error, because it is manifest that the sum awarded in favour of the plaintiffs was too great, and the award could not have been confirmed without injustice.

[LANCASTER, MAY 24, 1826.]

EISENHART and others *against* SLAYMAKER.

IN ERROR.

On the trial of a cause in the Court of Common Pleas, the original records of that court, removed to the Supreme Court on a writ of error, and there remaining, may be given in evidence. The docket entries of the Court of Common Pleas may also be given in evidence, after the records have been removed.

The order of giving evidence is at the discretion of the court before which the cause is tried, and is not the subject of a writ of error. It therefore is not error to permit a judgment and the proceedings thereon, under which the plaintiff in ejectment claims, to be given in evidence, without previously showing some colour of title in the defendant in the judgment, if it appear subsequently that the defendant in the ejectment came into possession under the defendant in the judgment.

A copy of a notice to quit is competent evidence, without notice to produce the original.

A release by two lessees, will not bar an action against the landlord by a third, unless it appear that the covenant was joint; and this the party alleging that it was, must show.

Where defendants in ejectment come into possession as tenants of the person as whose property the land in dispute was sold by the sheriff, under a judgment confessed by him, they cannot set up, as a defence, a mortgage and release of the equity of redemption, given to one of them by the defendant in the judgment.

On the trial of this ejectment in the Court of Common Pleas of York county, thirteen bills of exception were taken by the plaintiffs in error, the defendants below, to the opinion of that court upon questions of evidence, and brought before this court on a writ of error.

(Eisenhart and others v. Slaymaker.)

It appeared that the action was brought by *Henry Slaymaker*, to recover a tract of land which he had purchased as the property of *Caleb Kirk*, under whom the defendants, *George Eisenhart*, *Aquilla Kirk*, and *Elmer Kirk*, held as tenants. The plaintiff, without having previously shown any title to the land in question in *Caleb Kirk*, and before it had appeared that the defendants were in possession under him, offered in evidence the original records of two judgments obtained on the 7th of *October*, 1817, in the Court of Common Pleas of *York* county, against *Caleb Kirk*, and the proceedings thereon, under which the land had been sold. These records were then in the Supreme Court, having been sent up on writs of error, and certified by the Court of Common Pleas. The counsel for the defendants objected to their being given in evidence, but the court overruled the objection. The plaintiffs then offered in evidence the entries in the docket of the Court of Common Pleas in these suits, which the defendants' counsel objected to, but the court permitted them to be read to the jury. The admission of these records and docket entries in evidence, formed the subject of the first five bills of exceptions.

The sixth bill of exceptions having been given up on the argument, its contents need not be stated.

The plaintiff offered in evidence a copy of a notice, dated *April* 13th, 1820, given by him to the defendants, of his purchase of the premises at sheriff's sale, and requiring them to surrender to him the possession in three months from its date. The original notice was served by the person who made the copy offered in evidence, on *Aquilla* and *Elmer Kirk*, who stated to him that they rented under their father, *Caleb Kirk*. *Eisenhart* was not at that time on the premises. An objection was made by the defendants' counsel to the copy being read to the jury, because no notice had been given to produce the original. The court overruled the objection, and an exception was taken to their opinion.

The eighth and ninth bills of exception were abandoned.

The defendants offered *Caleb Kirk*, as a witness to prove, that before the sale made by the sheriff to *Henry Slaymaker*, he had entered into an agreement with certain persons, who had informed him they intended to appear on the day of sale and bid for the property, by which agreement it was stipulated on the part of Mr. *Slaymaker*, that if those persons would not appear and bid, he would secure to them the amount of certain claims which they had on *Caleb Kirk*; which agreement was carried into effect. The counsel for the plaintiff objected to the witness, and the court sustained the objection. The defendants then read to the court a release, dated *July* 10th, 1820, from *Caleb Kirk* to *George Eisenhart*, of all his interest in the land, and again offered him as a witness. The plaintiff's counsel objected to him, and produced a list of mortgages and judgments against *Caleb Kirk*. The court again rejected him. The plaintiffs then produced a release, dated

(Eisenhart and others v. Slaymaker.)

April 3d, 1823, from *George Eisenhart*, and another of the same date from *Elmer Kirk* to *Caleb Kirk* of all actions, demands, &c. and renewed their offer of *Caleb Kirk* as a witness; but the court refused to permit him to be sworn, and sealed the tenth and eleventh bills of exceptions.

The defendants then proposed to give in evidence to the jury an unrecorded mortgage on the land in dispute, from *Caleb Kirk* to *George Eisenhart*, dated *June 20th, 1817*, and a release of the equity of redemption, dated *July 10th, 1820*. The evidence was objected to by the plaintiff's counsel, and rejected by the court, and the twelfth and thirteenth bills of exceptions were tendered and sealed.

The questions arising upon the several bills of exceptions were argued by *Lewis*, for the plaintiffs in error, and by *Barnitz* and *Hopkins*, for the defendant in error; after which—

The opinion of the court was delivered by

GIBSON, J. This ejectment was brought by the defendant in error, for a tract of land purchased at sheriff's sale as the property of *Caleb Kirk*, under whom the defendants came into possession. The plaintiff offered in evidence the original record of the judgments on which the land was sold, certified on a writ of error from the Supreme Court, by the same court in which this action was tried; to which the defendants objected—First, Because nothing less than an exemplification of these records, authenticated with the seal of the Supreme Court, was competent, the records being at the time in that court; and, secondly, Because no evidence had been given of title in *Caleb Kirk*, under whom it had not then been made appear that the defendants had come into possession.

In contemplation of law, these records were undoubtedly in the Supreme Court; but that the Court of Common Pleas could not take notice of them as records, without their being authenticated with the seal of the court in which they were, is an assertion that depends on an argument more technical than solid. It is in general true, that a court can determine on the authenticity only of its own records by inspection, and that full faith and credit can be given by it to all other records, only on the foot of an authentication with the seal of the court to which such records belong. But there are peculiar circumstances in the case before us, which are equipollent to the seal of the Supreme Court. These records had been certified by the court in which the issue was trying, to the Supreme Court on writs of error, and were precisely in the condition in which they were sent by the court below. The judges of that court, therefore, were not strangers to them. They could not but know that they had been records of their own court, for their own return was attached to them; and this led inevitably to the conclusion, that those records remained still in the Supreme Court. The judgments could not have been reversed; for the Su-

(Eisenhart and others v. Slaymaker.)

preme Court is required in that event to endorse its judgment on the record itself. What use then for an authenticated copy, when that which was produced was indisputably the original? In *England*, records are not permitted to be carried from place to place; but in *Pennsylvania*, we know that the original records of the land office, as well as of the courts of justice, are permitted to be taken to any place within the state, where the production of the original is necessary to the administration of justice; and in such case it is never authenticated with a seal, but proved to be the original by parol evidence. If, then, there was enough to satisfy the court that these were records of the Supreme court, (and for that purpose I think its own return to the writs of error was amply sufficient,) there was no error in letting them go to the jury.

But the docket entries of these suits, were read to the jury from the docket which all along remained in the court below; and this also is alleged as error. No doubt a writ of error removes every part of the record. But here the object was to prove what the record was before it was removed, when the land was sold on these judgments; and it would be refining too much to say that the court below, having certified these entries to the Supreme Court, cannot look into the docket from which they were taken to see what they are, but must wait till they are certified back again by the Supreme Court.

Another ground of exception, common to the first five bills of exception is, that the judgment and subsequent proceedings were not admissible without at least colour of title being shown in *Caleb Kirk* at the time of the sale. Granting that at this stage of the trial, it did not appear the defendants had come into possession under *Kirk*, yet what was there to prevent the plaintiff from beginning with this part of his evidence first? The order of giving evidence is subject to the discretion of the court, and is not the subject of error. The evidence might properly have been rejected for irrelevancy, but, having been admitted, we are to suppose that it was coupled with an offer subsequently to show title in *Kirk*, or that the defendants came into possession under him. There may, however, be cases in which the court may be *bound* to reject for irrelevancy; but this is not one of them, and on this record we cannot say the court was wrong.

The sixth bill of exceptions is abandoned. The seventh raises a naked question, whether the copy of a notice to quit is competent without notice to produce the original. Every written notice is, for the best of all reasons, to be proved by a duplicate original; for if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself; and thus a fresh necessity would be constantly arising *ad infinitum*, to prove notice of the preceding notice; so that the party would, at every step, be receding instead of advancing.

The eighth and ninth bills of exception are abandoned. The

(Eisenhart and others v. Slaymaker.)

question arising on the tenth and eleventh, is whether *Caleb Kirk* was a competent witness for the defendants. When he was offered, it appeared that the defendants had come into possession under him; but he and they, with the exception of one of them, had reciprocally released each other. In the event of a recovery in this action, the witness would undoubtedly be liable to the defendants on the implied covenant in the lease; and hence a question whether the release of two lessees will bar the third. This will depend on whether the tenancy be joint or several; for the covenant raised by implication will follow the nature of their estate; and the release of one will bar the others only where the covenant is joint. Here we cannot pronounce whether the defendants were joint tenants or tenants in common; or even whether their possession was not several, each holding particular parts of the premises under distinct leases: and, to render the release of the two binding on the third, required of the defendant, to show that the three were joint covenantees; for the release of one will not be presumed to bind another till sufficient to produce that consequence be shown.

The question arising on the twelfth and thirteenth bills of exceptions, is whether the mortgage and release of the equity of redemption to *Eisenhart* were competent evidence. At the time they were offered, the defendants did not pretend that they had not come into possession under *Kirk*: they stood in his place, and could urge no defence which would not have been open to him, had he been a defendant. But nothing is more clear, than that he could not have set up the defence which was attempted, being estopped by the judgment from disputing the purchaser's right to the possession under it; and the defendants also, standing in his stead, are consequently estopped. They have thus failed in all their points, and the judgment is affirmed.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

BOYER, for the use of his Assignees, *against* POTTS.

IN ERROR.

A justice of the peace is not presumed to be the agent of the plaintiff in a suit brought before him. Therefore a copy of the plaintiff's account, furnished by the justice to the defendant, accompanied by a note demanding payment, is not evidence against the plaintiff, on the trial of another action.

ERROR to the Court of Common Pleas of *Berks* county, in an action of assumpsit, brought by the plaintiff in error, *Jacob K. Boyer*, for the use of his assignees, against *David Potts, jr.*, the defendant in error.

(Boyer, for the use of his Assignees, v. Potts.)

Upon the trial in the court below, after the plaintiff had given in evidence his book of original entries, the defendant proved that the plaintiff had brought a suit before *William Mendenhall, Esq.*, a justice of the peace, since deceased, against *David Potts, sen.*, the father of the defendant; and, to prove that the suit before the justice was for the same cause of action as that under trial, he offered in evidence a copy of *Boyer's* account, furnished by the justice to *David Potts* the elder before suit was brought, accompanied by the following note:—

“Sir,—The above is a copy of Mr. *Boyer's* account. Would thank you to let me hear from you respecting it soon.

Yours, respectfully,

(Signed)

William Mendenhall.”

The counsel for the plaintiff objected to the evidence, but the court admitted it, and an exception was taken to their opinion.

The errors assigned on the argument in this court, were in the admission of the evidence above stated; and in the charge of the court, in withdrawing, as was alleged, the facts from the jury.

Darling and Buchanan, for the plaintiff in error.

Baird and Biddle, for the defendant in error.

The opinion of the court was delivered by

GIBSON, J. There is no colour to say, that the court withdrew the determination of the facts from the jury; and the inquiry is narrowed to the bill of exceptions to evidence. It was alleged, that *Boyer* had sued *David Potts*, the father, before Justice *Mendenhall*, for the same cause of action that is laid in this suit against his son; and, to prove this, the defendant offered an account furnished to his father, in the handwriting of Justice *Mendenhall*, who is dead, accompanying a note from the justice, which contains a demand of payment. This was furnished before suit was brought; and it is contended to be competent evidence, because, as it is said, the justice was the agent of *Boyer*, and, consequently, that his acts are to be treated as the acts of his principal. There was no evidence of any delegation of authority, except what was thought to result from the relation in which the parties stood of magistrate and suitor; and the law, certainly, will not from this presume the existence of an agency so fraudulent and base. Justices of the peace, no doubt, frequently act as agents for those who employ them; but they ought to know that they do so at the peril of being convicted of a highly aggravated misdemeanor, which is indictable at the common law. Ignorance cannot palliate a crime of this sort; for the turpitude of acting both as a judge and party in the same cause, cannot but be obvious to the dullest comprehension. In the case before us, it is impossible to connect *Boyer* with the act with which it is attempted to fix him; and, as the act of the justice, it was entirely extrajudicial. We are therefore of opinion that the paper was incompetent, and ought not to have been admitted.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 24, 1826.]

HAIN and another *against* KALBACH, Administrator of
BELL.

IN ERROR.

In a suit upon a bond, given for a pre existing debt, due to the plaintiff by a third person, parol evidence is not admissible to show, that at the time it was executed the obligee declared, that he would require nothing more than the interest to be paid during his life, and that at his death the bond should become null and void; unless the obligor was induced by such declarations to execute the bond.

ERROR to *Berks* county.

In the court below, it was an action of debt on a bond for two hundred pounds, brought by *John Kalbach*, administrator of *John Bell*, deceased, against *Benjamin Hain* and *Elizabeth Shaeffer*. The defendants pleaded payment, with leave to give the special matter in evidence, and gave notice that on the trial they should prove, that *Leonard Shaeffer*, the husband of *Elizabeth Shaeffer*, died in bad or insolvent circumstances: That after his death, *William Bell* alleged that he was indebted to him, and requested the defendants to execute a bond to him for the amount of the debt: That he declared, he would require nothing more to be paid on it than the interest which would accrue during his lifetime, and that after his death, the principal and interest of the said bond should never be paid, but the said bond should become null and void: That in consequence of this declaration, the defendants were induced to execute the bond on which this suit is founded, and upon no other cause or consideration whatever, and that the interest which accrued on the said bond, during the lifetime of the said *William Bell*, was paid to him.

On the trial, the defendants proved that the bond in question was given in lieu of another bond, on which *Leonard Shaeffer* had in his lifetime borrowed money of *William Bell*, in which bond the witness, who was examined touching this matter, and was a subscribing witness to the second bond, was surety: That at the time of *Leonard Shaeffer's* death, his circumstances were not, the witness believed, very good; nor were those of the witness so good, when the second bond was executed, as when the first was given. It was admitted that the second bond was executed at the request of *William Bell*.

The defendants then offered to prove, under the notice of special matter, "that at the time of the execution and delivery of the said bond, the said *William Bell* alleged that he would require nothing more to be paid on it, than the interest which would accrue thereon during the lifetime of the said *William Bell*, and that after the death of the said *William Bell* the principal and interest on the

(Hain and another v. Kalbach, Administrator of Bell.)

said bond should never be paid, but that the bond should become null and void."

To the admission of this evidence, the counsel for the plaintiff objected, and the court sustained the objection; whereupon the defendants' counsel excepted to their opinion.

Hayes and Baird, for the plaintiffs in error.

The question arising upon the bill of exceptions in this case, is very analogous to that in *Miller v. Henderson*, 10 *Serg. & Rawle*, 290, in which it was held, that in a suit against a surety in a bond parol evidence might be given to show that he executed the bond under a declaration by the obligee, that it was mere matter of form, and he should never be called upon to pay it. It comes too within the principle of *Field v. Biddle*, 1 *Yeates*, 132, 2 *Dall.* 171, *S. C.*, *Hill v. Ely*, 5 *Serg. & Rawle*, 363, and many other cases, that parol evidence may be given to show fraud or mistake in a written instrument. It is not necessary that the notice of special matter should expressly allege fraud. It is enough to give notice of the facts intended to be proved. No fraud, however, is alleged in *Bell*. As long as he lived he complied with his agreement, and it rested with his administrators to do the rest. The evidence given of *Shaffer's* circumstances, though it did not come quite up to the notice, approached very near to it. Accompanied by this, the evidence offered ought to have gone to the jury, for as much as it was worth.

Buchanan and Biddle, for the defendant in error.

The bond is payable to *William Bell*, his executors, administrators, or assigns, and the evidence was to contradict it, and convert it into an annuity for the life of the obligee. There was no offer to prove fraud, which distinguishes it from the case of *Miller v. Henderson*, which was expressly put, by the Chief Justice, upon the ground of fraud in inducing the obligor to sign the bond, through false representations and promises. The danger of permitting parol evidence is very great, and this court has leaned strongly against it. The general rule is, that it is not admissible to contradict, add to, or alter a writing, and the rule is the same in equity as at law. 1 *Phil. Ev.* 423, 424, 427, 428. *Peake*, (*Norris's Ed.*) 168. Fraud, it is true, forms an exception to the rule; and mistake also, properly understood, that is, mistake in drawing the instrument different from the instructions of the parties. But except in the cases of fraud or mistake in drawing the instrument, parol evidence is inadmissible. *Heagy v. Umberger*, 10 *Serg. & Rawle*, 341. But the difficulty of proving mistake is so great, that there is no instance of a mistake being established which was denied by one of the parties 2 *Johns. Ch. Rep.* 597. The evidence offered by the defendant is not conformable to his notice of special matter. The notice was, that it would be proved that the husband of the defendant *Elizabeth Shaeffer*, had died in bad or insolvent circumstances, but no such proof was made, or offered to be made;

(Hain and another v. Kalbach, Administrator of Bell.)

Nor have the defendants alleged fraud in *William Bell*, or that they were induced to execute the bond in consequence of his declarations that it should be void at his death. The promise offered to be proved, was without consideration and void. 1 *Com. on Cont.* S, 9, 10.

The opinion of the court was delivered by

GIBSON, J. Had the defendants below offered to prove that they were induced to execute the bond in consequence of the representations of *Bell*, the plaintiffs' intestate, that only the interest should be exacted during his life, and that the principal should not be called for after his death, the case would have fallen within the principle decided in *Miller and Henderson*; but in this particular it was entirely deficient. It is no answer to say, the jury might have believed from the intrinsic evidence of the transaction itself, that *Bell's* promise was the moving consideration on which the defendants became personally liable for the debt of *Leonard Shaeffer*, who died in doubtful circumstances. It may be so. But we are to recollect, that evidence of this kind is always attended with a greater or a less degree of danger, and that sound policy requires it to be restricted to cases of clear and palpable fraud, where the evidence, if believed, will not leave the jury to grope for a case proper for relief. Were juries permitted to weigh probabilities in cases of this sort, there are few securities that would not be swept away by parol evidence of idle and extravagant expressions at the sealing and delivery. Where a fraud of this kind is alleged, the evidence in support of it must come fully up to the mark, so as not to leave the conclusion to be drawn from it doubtful, taking the evidence to be true in fact. In this respect, it was deficient, and we are of opinion it was properly excluded.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

MOYER *against* KIRBY.

IN ERROR.

This court will not reverse a judgment entered by confession in the court below, in an action of debt, because no declaration has been filed.

But where the suit is commenced by writ, an appearance entered, a plea put in, a judgment confessed, and the plaintiff, after judgment, by leave of the court, files a declaration, *nunc pro tunc*, the judgment will be reversed, if the declaration sets forth no cause of action.

An action of debt will not lie on a judgment for damages, obtained under the act of the 6th of April, 1802, "to enable purchasers at sheriffs' and coroners' sales to obtain possession." The remedy prescribed by the act, can alone be pursued.

ERROR to the Common Pleas of *Berks* county, in which court *David Kirby*, the defendant in error, issued a *capias* in debt for four hundred dollars against *George Moyer*, the plaintiff in error, who entered special bail. A plea and replication were filed, but no declaration, and the defendant afterwards confessed judgment. A *capias ad satisfaciendum* issued against the defendant, which was followed by a *scire facias* against the bail. On motion, the court set aside the *ca. sa.*, and directed the *sci. fa.* to be discontinued, each party paying his own costs. The plaintiff's counsel afterwards moved for leave to file a declaration, *nunc pro tunc*, and to issue a *ca. sa.* against the defendant, which was granted.

The declaration set forth, as the cause of action, a judgment for damages rendered by two justices of the peace, in a proceeding under the act of the 6th of April, 1802, to enable purchasers at sheriffs' and coroners' sales to obtain possession, &c.

Baird and *Buchanan*, for the plaintiff in error.

1. Judgment was entered in the court below without a declaration having been filed, which was error. If no declaration be filed, the judgment is erroneous, though the cause was tried on the merits. *Wallace v. Elder*. 9 *Serg. & Rawle*, 143. So, in replevin, for want of a plea. *Lecky v. McDermott*, 5 *Serg. & Rawle*, 331. So if no issues be joined. *Brown v. Barnett*, 2 *Binn.* 33. Judgment in dower will be reversed, if there be no *narr.* 2 *Yeates*, 433. And so will a judgment by confession. *Hardy v. Moore's Executors*, 3 *Harr. & M'Hen.* 389. *Rowen v. State for the use of Hughes*, *Id.* 408.

2. The court had no right to permit a declaration to be filed, after judgment and execution.

3. The declaration filed by the permission of the court, set forth no legal cause of action. It stated that the damages were assessed by the justices and not the jury, to whom alone the power to assess them belonged by the act of the 6th of April, 1802, *Purd. Dig.* 621. A court of limited jurisdiction, like that created by the act

(Moyer v. Kirby.)

of assembly, must appear to have acted within the sphere of its jurisdiction; but on the face of the declaration it appears, in this instance, to have exceeded its jurisdiction. *Rex v. Croke, Cowp. 26. 1 Peters' Rep. 36. 5 Serg. & Rawle, 179.* It is no answer to this objection to say, that the declaration is upon a judgment, which is valid until reversed. A judgment of a court of competent jurisdiction, is conclusive until reversed; but where the court has no jurisdiction, the judgment is void.

4. Supposing the damages to have been rightly assessed by the justices, no action of debt can be maintained on their judgment. The act of assembly which gives the damages, points out the mode in which they shall be recovered. And the act of the 21st of March, 1806, 4 Sm. L. 332, declares that where a remedy is given by act of assembly the common law shall not be resorted to. But, independently of that act of assembly, a statutory remedy having been given, that alone must, upon common law principles, be pursued. No precedent can be found in favour of such an action as this.

Smith, for the defendant in error, was informed by the court, that he need not speak to the first and second exceptions taken by the plaintiff in error.

He contended, that the declaration set forth a good cause of action. It stated a judgment, and referred to the record by which it more fully appeared. This judgment remains unreversed, and cannot be controverted in another suit. 1 *Chitty on Pl. 354. 5 Att. Pr. in K. B. 434. 2 Lev. 161. 2 Burr. 1009.*

The opinion of the court was delivered by

DUNCAN, J. The plaintiff in error has assigned five reasons for reversing this judgment.

1. That judgment was entered against him without a declaration.

2. That the court permitted the defendant in error, the plaintiff below, to file a declaration after execution, *nunc pro tunc*, and to take out a new one on the record so amended.

3. That the declaration so filed, set out no legal cause of action.

4. That if it set forth any, it is one purporting to be founded on a judgment for damages, rendered by two justices of the peace in a proceeding under the act of the 6th of April, 1802, enabling purchasers at sheriffs' sales to obtain possession; whereas the act gives no authority to the justices to assess the damages in such proceeding, but to the inquest. And,

5. That no action of debt lies, in the Court of Common Pleas, for the damages assessed.

The first and second specifications of error I will consider together. If no declaration had been filed, on the state of the record, I would long pause before I reversed the judgment for that reason. It would be sweeping work at this day, after a practice of nearly

(Moyer v. Kirby.)

half a century, to reverse a judgment by confession for a certain sum in an action of debt. It has certainly been a common practice for parties to go to the prothonotary's office, enter an amicable action, and the defendant to confess a judgment without a declaration. This may be a practice exposing the defendant to some risk: he may find it difficult to prove the consideration of the judgment, and so plead it in bar of a subsequent action, because it does not show any cause of action, or on what account the judgment is confessed. But the usage is inveterate, and has been so long sanctioned, that it would now be ruinous to upset all that has been done under it, even though the court might observe its inconvenience. The practice of every court is the law of that court, and much of the practice in this state has no other foundation than the usage itself. But this was the case of an adverse suit by writ, appearance by attorney, plea put in, and judgment by confession, waiving for the time the declaration. I think the attorney would have been justified in filing a declaration, even without leave of the court. The declaration being filed by order of the court, on the plaintiff's application, *nunc pro tunc*, it is now as open to objection, as if it had been filed before judgment, where the objection goes to the root of the action, not where the defect is mere matter of form; and as this is not after a verdict, which might perhaps have cured the mistake, in setting out that the damages had been assessed by the justices and not by the jury, though this is far from being clear, yet there having been no verdict, and the jurisdiction of the justices, whose jurisdiction in this case is peculiar, not appearing, but the contrary appearing, that they had no jurisdiction to assess the damages, this is a fatal error; for in a declaration founded on such proceeding, it must appear that the power exercised by this limited and circumscribed jurisdiction, has conformed to the law conferring the authority. This tribunal must not only show that it had jurisdiction, but this must appear on the face of the proceeding. Now the proceedings, as here set out, show that it was an assessment of damages by the justices, who had not the power, and not by the jury, who had it. Debt lies for an amercement in a court leet, but in this it ought to be alleged in the declaration, that the defendant was an inhabitant, as well at the time of the amercement as of the offence; but the omission of this averment is cured by the verdict. *Wicker v. Norris*, *Hardw. C.* 116. *Bull. N. P.* 167.

But the fifth exception is the one on which the court now decides, as it cuts to the action root and branch.

In this summary proceeding of a jurisdiction very limited, created *pro hac vice*, not proceeding according to the course of the common law, where the remedy is a special one, pointed out by the law giving this new power, I am clearly of opinion that debt will not lie. The remedy here is by warrant from the justices to levy the damages and costs from the goods and chattels of the de-

(Moyer v. Kirby.)

fendant. And, independent of the positive law of the state on this subject, the rule of the common law is, that upon a new statute which prescribes a particular remedy, no remedy can be taken but the particular remedy prescribed by the statute. The act gives no power, but to levy the damages by the warrant of the justices on the goods and chattels; none to touch the body. The goods of the tenant are liable to distress and sale, but there is no power to arrest him to take his body.

No action of debt lies on a statute staple as it does on a statute merchant, for the seal of the party is not put thereto, and this is a duty made by a special law, which was not by the common law, and therefore he shall have no other remedy for it than the statute hath provided. 7 *Vin.* 349, *tit. Debt, M.*

Debt lies not on a statute staple, for the seal of the party is not affixed, 1 *Roll. Ab.* 599, *pl.* 45; but it will lie on a statute designed to be a statute staple, but not executed pursuant to the statute. *Cro. Eliz.* 233, 494. But this was, because, being void as a statute, and the party having no remedy to enforce it as a statute, it was good as an obligation at common law. *Moore*, 405. *Gould. Pl.* 157. It is for these reasons it has been held that debt will not lie for a poor rate, because the statute gives no authority but to distrain the goods of the delinquent. *Stevens v. Evans and others*, 2 *Burr.* 1157.

The cases cited from *Massachusetts* proceed on the same principle. It is for this reason the opinion of the court, that the judgment be reversed.

Judgment reversed.

[LANCASTER, MAY 24, 1826.]

NEFF and another *against* BARR.

IN ERROR.

Where judgment has been confessed in one county, on a bond by virtue of a warrant of attorney, the power is satisfied; and another judgment cannot be confessed on the same bond, by virtue of the same warrant, in another county. But this cannot be taken advantage of on a writ of error. The court in which the second judgment is entered, will, under ordinary circumstances, vacate it. But how far the court will exercise their discretionary power to let in the subsequent judgment of a third person, *quære*.

A feigned issue is to inform the conscience of the court as to disputed facts, and is to be moulded as their discretion dictates. And the mode in which it is done by the court below is not the subject of a writ of error, and cannot be judicially decided on by this court.

Where two judgments have been entered by virtue of the same power in different counties, and an issue is directed by the court in which one of the judgments is entered to determine whether or not that judgment be valid, the party who alleges that it is not valid, may give in evidence an entry in the docket, stating the hour and minute when the judgment was entered; if it appear from other evidence that such entry was made by the opposite party, or his agent. But *it seems*, that the burden of showing which of the judgments was first entered, properly lies on him by whom they were entered.

WRIT of error to the Court of Common Pleas of *Lancaster* county, in a feigned issue directed by that court to try the validity of a judgment, in which *Abraham Barr*, *Christian Barr*, and *Michael Withers* were plaintiffs, and *Joseph Withers* and *Cheyney Pelin* defendants.

Abraham Barr, the defendant in error, was plaintiff in the issue, and *John Neff* and *Francis Kendig* defendants. The circumstances which gave rise to it were as follows:

Joseph Withers and *Cheyney Pelin* gave their bond to *Abraham Barr*, *Christian Barr*, and *Michael Withers* in the penalty of three thousand dollars, conditioned for the payment of fifteen hundred dollars, with a warrant of attorney to confess judgment or judgments, in any of the courts of record of the state, after one or more declarations filed. On this warrant of attorney, judgment was confessed on the 2d of *May*, 1814, by *Charles Smith*, Esq., in the Common Pleas of *Lancaster* county. The docket of this judgment contained the following entry: "Entered a quarter past ten, A. M." On the same day, on the same warrant, and by the same attorney, judgment was confessed in the Common Pleas of *York* county, and the following entry was made in the docket: "Entered half past six o'clock, A. M."

John Neff, *Francis Kendig*, *George White*, and *Thomas Crawford*, issued a *capias* in case against the said *Joseph Withers*, in the Court of Common Pleas of *Lancaster* county, returnable to *August* Term, 1814. This cause was arbitrated, and on the 14th of *March*, 1815, an award was filed in favour of the plaintiffs, for ten hundred and seventy-three dollars and fifty cents. From this

(Neff and another v. Barr.)

award the defendant appealed, and, after certain proceedings, the plaintiffs, on the 22d of *November*, 1818, obtained judgment in a *scire facias* against the administrators of the defendant, who had died in the meantime.

To *April* Term, 1815, a *fieri facias* was issued upon the judgment obtained by *Abraham* and *Christian Barr* and *Michael Withers*, in *Lancaster* county, and levied on real estate. A *venditioni exponas*, returnable to *August* Term, 1815, was issued, which was returned, "Time given by the plaintiffs." After this, several successive writs of *venditioni exponas* were issued, which were returned, "Unsold for want of buyers." On the 20th of *April*, 1822, upon motion and affidavit filed, the court, on argument, granted a rule to show cause why the judgment should not be vacated. This motion was made on behalf of *Neff* and *Kendig*, on the ground, that by the entry of judgment in *York* county, the specialty debt was merged in the judgment, and the warrant of attorney was *functus officio*. The rule to show cause was argued, and the court held the matter for some time under advisement. On the 25th of *November*, 1822, the court directed an issue to be formed, to ascertain whether the judgment in *Lancaster* or that in *York* county, was first entered; the judgment to remain as a security. And on the 30th of the same month, they directed an issue to be formed, "in which the jury may determine the facts necessary to ascertain, which of the judgments is entitled to a legal preference;" namely, the judgment of the *Barrs*, or that of *Neff* and *Kendig*. On the 22d of *December*, 1822, a declaration was tendered by *Abraham Barr*, who survived *Christian Barr* and *Michael Withers*, in which he was made plaintiff, and *Neff* and *Kendig* defendants, and which laid a promise by them to pay him ten dollars, if the judgment of the said *Abraham Barr* against *Joseph Withers* and *Cheyney Pelin*, in *Lancaster* county, was a legal and valid judgment. This declaration, which specially recited the judgment of *Neff* and *Kendig*, was marked, filed *December* 28th, 1822. *Neff* and *Kendig* also tendered a declaration, which was marked, filed *January* 4th, 1823, in which they made themselves plaintiffs and *Abraham Barr* defendant, and laid a promise to pay him ten dollars, if the judgment in *York* county was not entered before the judgment in *Lancaster* county. Neither of these declarations was acted upon, nor was any plea entered. The court, not considering that either of them met their views, on the 24th of *January*, 1824, directed an issue, in which *Barr* was plaintiff and *Neff* and *Kendig* defendants, upon a wager of ten dollars, whether the judgment entered in *Lancaster* county was a legal and valid judgment. To this declaration *Neff* and *Kendig* pleaded, "that, though they did promise, yet the said judgment was not a legal and valid judgment." *Barr* replied, "that it was a legal and valid judgment." On this issue, the parties went to trial. The jury found a verdict for the plaintiff, on

(Neff and another v. Barr.)

which judgment was entered, and it was to reverse this judgment that the present writ of error was brought.

On the trial, the defendants, after having given in evidence an exemplification of the record of the Court of Common Pleas of *York* county, of the judgment by *Abraham* and *Christian Barr* and *Michael Withers* against *Joseph Withers* and *Cheyney Pelin*, read the deposition of *William Barber*, Esq., who stated that the entry of this judgment was made by him on the day, and, to the best of his knowledge and belief at the time in the morning, stated on the record, to wit, at half past six o'clock: That he was prothonotary at the time: That he recollected that some person called at his house early in the morning of the 2d of *May*, 1814, and desired the deponent to go with him to the office, when the entry above stated was made: That the deponent could not say with certainty who it was that called upon him, but was under the impression it was one of the plaintiffs in the judgment, and that he requested to have the hour and minute of its entry noted on the docket, with what view the deponent could not state.

The defendants then gave in evidence the record of the suit brought in the Court of Common Pleas of *Lancaster* county to *August* Term, 1814, by *John Neff* and others against *Joseph Withers*, and the subsequent proceedings on the *scire facias* to *November* Term, 1818, against the administrators of *Joseph Withers*, and afterwards examined *Henry Brenneman*, who testified, among other things, that *Abraham Barr* had said to him that he went to Mr. *Smith*, and told him to have the judgment entered in *Lancaster* county at a certain hour, and he, *Barr*, would try to have it entered at *York* at the same hour. The witness asked, if it was so? To which *Barr* answered, it was not; it was a little later; a few hours; nine o'clock was the hour Mr. *Smith* was to have it entered. *Michael Barr*, another witness, stated that *Abraham Barr* told him he had come to *Lancaster* for the purpose of entering his judgment; that he called on Mr. *Smith*, and told him that he, *Barr*, should go on to *York* and enter the judgment at a particular hour, and he, Mr. *Smith*, should have it entered at *Lancaster* at the same time. He did not say at which place he had entered it first. *Gerardus Clarkson*, who was also examined, stated that the entry was in his handwriting, and he was satisfied it was done at the time. The hour and minute of entering the judgment was never entered while he was in the office, and he did not recollect why it was done in this case. He had no recollection about it. He was certain he did not do it of his own accord, and had no doubt he was told to do it by some person. It might have been done then or some days after; but he believed it was done at the time from his having marked it so, but he had no recollection about it.

After the evidence above stated had been given, the defendants offered to read to the jury the entry in the docket of the judgment

(Neff and another v. Barr.)

in *Lancaster* county, "Entered at a quarter past ten, A. M.;" the plaintiff having refused to read that entry, when the record of the judgment was given in evidence by him. The plaintiff's counsel objected to the entry being read in evidence. The court sustained the objection, and an exception was taken to their opinion. This was the first error assigned.

The second was, that the court below had no authority to direct the issue on which the trial was had.

Ellmaker and *Rogers*, for the plaintiffs in error.

1. It was proved that the judgment in *York* county was entered at half past six o'clock, A. M., and the docket entry offered by us would have proved, that the judgment in *Lancaster* county was entered at a quarter past ten, A. M. We gave evidence, tending to show that *Charles Smith*, Esq., was the agent of *Abraham Barr*; and, if so, any acts or declarations of his in the course of his agency, were evidence against his principal. We also gave evidence, tending to show that Mr. *Smith* ordered this entry to be made, and this fact ought to have been submitted to the jury. Here the entry was in the handwriting of one of the witnesses, and the rule is, that where a written memorandum is made by a witness, the court will compel him to produce it when he gives his evidence. 1 *Rep. of Con. Ct. of South Carolina*, 423.

2. The court had no right to direct the issue on which the cause was tried, after having directed another and more proper issue; nay, after having directed two issues. The only fact necessary to be ascertained was, whether the judgment in the county of *York* was entered before that in *Lancaster*. If that fact had been decided in our favour, the court would then have decided whether to vacate the judgment or not, and they would have heard any objection to vacating it which could have been urged by the plaintiff, and if necessary directed other issues to try other facts. But instead of this, the court directed an issue, involving questions of law, to be tried by a jury. The declaration was drawn by the President, and was not conformable to the order previously made; and this the court had no power to do. It was too late to make the amendment 1 *Bac. Ab* 146. 1 *Tid*, 651, 660, 661. *Cro. El* 497.

Jenkins and *Hopkins*, for the defendant in error. The question whether the judgment in *York* or *Lancaster* county was first entered, was not the only one to be taken into consideration in this case. The judgment in *Lancaster* county was not void, though it may have been erroneous. It had remained seven years unquestioned, after which no writ of error could be brought; besides which, it had been entered with a release of errors. Several writs of *venditioni exponas* had been issued for the sale of the land of *Withers*, which had been postponed at his earnest request. We contended, that it was a case in which *Neff* and *Kendig* ought not to be heard, nor even *Withers*, so far as related to vacating the judgment, if he had wished it, though it does not appear that he

(Neff and another v. Barr.)

ever complained. *Pellin* certainly did not. The plaintiffs in error have not sustained either of their exceptions.

1. There was no proof that the docket entry, naming the time of entering the judgment, was made by order of the plaintiff or of his attorney, Mr. *Smith*; without which it could not be read, for it formed no part of the record. No law authorizes such an entry. By the act of the 21st of *March*, 1772, *Purd. Dig.* 390, the day of entering a judgment is required to be entered on the margin of the record, but not the hour. The clerk was allowed to refresh his memory by an inspection of the entry, yet he does not prove that the plaintiff had any agency in having it made. It was the voluntary act of the clerk, and therefore was not evidence.

2. It is a power necessarily inherent in the court, to mould issues according to their discretion, to ascertain the necessary facts, and to meet the justice of the case. The first issue was confined to the time of entering the two judgments, which cut us off from many points of defence. The court perceived this, and during the same term, altered the issue. After this, each party drew a declaration of different import, and the court was appealed to, to decide between them; in consequence of which, the President drew a declaration differing from both the others, putting the matter upon the question, whether the judgment in *Lancaster* was valid, and on this issue the cause was tried. On no other issue could all the points involved in this dispute be discussed, and justice required that it should be adopted.

The opinion of the court was delivered by

DUNCAN, J. The natural order of considering the errors specified in the record, is, first to take up the question on the power of the court to direct the issue. There is no exception to the opinion of the court on the trial of the cause, and the record shows that *Neff* and *Kendig* put in their plea to this declaration, and went to trial on that issue. That the judgment in *York* county, if first entered, would merge the specialty debt, we have no doubt. The power to confess a judgment, or judgments, was satisfied by the entry of the first judgment. That this, however, cannot be taken advantage of on a writ of error seems equally clear. The court in which the second judgment was entered, would, under common circumstances vacate it. This was done by this court in *Martin v. Rex*, 6 *Serg. & Rawle*, 296. The judgment, however, was not considered as void, but irregular, and a sale under it would give the purchaser a good title. The attorney, as well as the plaintiff, would however be answerable for the consequences. How far and under what circumstances the court would exercise that inherent power, on the application of a third person, to let in his subsequent judgment, is what the court, at present, refrain from touching. Each case must depend on its special circumstances. Cases may occur in which justice would require the court not to interpose.

(Neff and another v. Barr.)

The motion, like others for summary relief, is one on which the court usually exercise their judgment without the intervention of a jury, and I do not see the propriety of directing an issue, unless it be to ascertain some disputed fact. *Share v. Becker*, 8 *Serg. & Rawle*, 242. The issue is to inform the conscience of the court. This is likewise the practice in chancery; for where the facts are complicated and uncertain, the chancellor, under a feigned issue, will send them to be investigated at law, in order to obtain an oral examination of the witnesses and a trial by jury. 3 *Bl. Com.* 452. It is an issue to be moulded by them, as their discretion dictates. Whether there was any disputed fact, except as to the time of entering the first and second judgments, I know not. I therefore cannot say this was an injudicious exercise of the power of the court. It is not broader than the issue *devisavit vel non*, which involves many facts, besides the mere execution and publication of the will; the sanity of the testator, his infancy, or his dotage; fraud in obtaining the will. Judging from the record, the court cannot see any thing which would justify them in reversing for a matter so purely in their discretion and under the power of the court. The mode of doing it the court cannot know, nor judicially undertake to decide on. The consideration of the court, in a case of this kind, is not the subject of a bill of exceptions, nor can it be assigned for error. It was a matter entirely with them, and cannot be viewed, from the inspection of the record, as an alteration of a record in judgment, but as the legitimate exercise of a discretionary power intrusted to them by the laws of the land. The court, therefore, cannot perceive any error in directing the issue, that can be reviewed or corrected here. Indeed, I cannot look at any thing but the action, which is an action on a wager claimed by *Barr*. The wager itself admitted by the pleading, and the issue whether the event had happened on which *Neff* and *Kendig* had lost the wager, and therefore nothing properly can be considered but whether any error took place in the trial of that action, or in the judgment rendered on it. If there was error in the trial, improper evidence received, proper evidence rejected, an error in any opinion delivered by the court and excepted to, the parties have their remedy, if they are aggrieved, by writ of error, and the plaintiffs here have availed themselves of that remedy; and I am of opinion that there was error in rejecting the entry of the hour of entering the *Lancaster* judgment, and I mean not to go out of the record to decide any point. But it is not unworthy of consideration, whether the plaintiff below ought not to have pleaded the time of the entry of his judgment, and whether the burden of proof would not lie on him. There are, in legal proceedings, no fractions of a day. The judgments, if in the same court, are, in contemplation of law, at the same instant. There could be no inquiry which was first entered, when both were entered on the same day; in a common case, for instance, if there be different judgments by

(Neff and another v. Barr,)

different plaintiffs against the same defendant, on the same day, in the same court. But if the law would allow, and I think it would, the inquiry made into the priority of instant when the power was first executed, where it had been twice executed in different courts, for the purpose of binding lands in different counties—then if the party by his own act has created the difficulty, to cast the burden of the proof of a fact, peculiarly within his knowledge, but not within the knowledge of his adversary, on his adversary, would be a hardship which it is questionable whether the law would subject him to. But certainly if it did, it would allow him to use the best evidence the nature of the case would admit of, and I cannot see what better evidence he could offer than the entry in the docket; not because it is a matter of record, conclusive of the fact, but evidence of the transaction of the man who had both judgments entered, or of his agents. The entry, it is proved by the declarations of Barr, was to be made at the time of day in which the confession of judgment took place. It was done so in the *York* judgment by his direction, and that it was to be so entered on the *Lancaster* judgment, and for the very purpose of ascertaining the priority of time, the clerk who made the entry testifies. It was by the instructions of the agent who brought the declaration to the office, and when the clerk, though he has no precise recollection on the subject, but what the entry furnishes, swears that it was done by direction at the time, as he believes, and that it would not have been done without such direction, and when the man now objecting to it, acknowledges that it was to be so done, to deprive the party of all means of proving this important fact, would be shutting out the light of the sun. There was evidence that this was the act of *Barr*; done by his direction; entered in the docket by his direction. It was part of the *res gesta*, and it was persuasive evidence, when the party declared that this unusual entry was to be made, when it was proved to have been so made, that it was made at the time it purports, by his direction. For this reason, I am of opinion that the judgment should be reversed and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 24, 1826.]

SHEETS *against* HAWK, and another.

IN ERROR.

The record of the discharge of an insolvent debtor, is conclusive as to the fact of his having complied with all things required by law to entitle him to a discharge; and cannot be enquired into in a collateral action.

It is not a forfeiture of the bond given by an insolvent debtor to the arresting creditor, under the act of 28th of *March*, 1820, if the record merely show that the debtor appeared and presented his petition at the time appointed; that the court appointed the first day of the next term for a hearing, directing, at the same time, notice to be given to the creditors, and that on the fourth day of the next term, he was sworn and discharged, without any record being made of his appearance or non-appearance on the first day, or of any continuance of the case from day to day; particularly if the arresting creditor, or the person beneficially interested, had notice, that the debtor was not discharged on the first day of the term, and endeavoured to make an arrangement with him respecting the debt, which would render it unnecessary for him to take the benefit of the act.

ERROR to the Court of Common Pleas of *Lebanon* county.

In the court below, it was an action of debt on a bond given by *Adam Hawk* with *Stephen Rigler*, as his security, to the plaintiff, *Mathias Sheets*, the arresting creditor under the supplement to the act for the relief of insolvent debtors, passed the 28th of *March*, 1820. The condition of the bond was, that if *Adam Hawk* should be and appear before the judges of the Court of Common Pleas, to be holden on the first Monday of *August*, 1822, then and there to take the benefit of the insolvent laws and surrender himself to the jail of the said county, if he should fail to comply with all things required by law to entitle him to be discharged, and generally to abide by all the orders of said Court of Common Pleas then and there to be held, then the said obligation to be void, otherwise to remain in full force and virtue.

The said *Adam Hawk* appeared on the first day of *August* Term and presented his petition for the benefit of the insolvent laws, and the court appointed the first Monday of the next term for a hearing and directed notice to be given to the creditors. The first day of the next term was the 4th of *November*, 1822. On that day *Hawk* did not appear; nor did he appear on the fifth or sixth of the month. No record was made in the case until the 7th of *November*, when it was entered on the minutes and endorsed on the petition, that *Adam Hawk* was sworn and discharged. This suit was then brought upon the bond, and on the trial, the defendant, after having proved the publication of the notice of *Adam Hawk*, to his creditors, in a *Lebanon* newspaper, on the 28th of *September*, and on the 5th, the 12th, the 19th, and the 26th of *October*, 1822, offered to prove that a notice to the creditors of *Adam Hawk* was published in another newspaper on the 5th and 19th of

(Sheets v. Hawk and another.)

October, and on the 22d of *November*, 1822; that on Monday, the 4th of *November*, 1822, *Adam Hawk* was called among other insolvent debtors and did not answer, upon which the court, on motion of Mr. *Kline*, his attorney, ordered the case to be continued from day to day; that he then sent a man for *Hawk*, who came in on the 7th of *November*, and was discharged; that it was the practice of the court, on the application of the attorney of an insolvent debtor, who does not appear on the day appointed for the hearing, to hold the case over or to continue it to the next term, or to some time fixed by the counsel for the petitioner; that it was also the practice to continue the case from day to day during the term: that *Hawk's* case was not continued to any particular day, but from day to day during the term; that Mr. *Wright*, the counsel, and not *Sheets*, was the party really interested in the bond; that Mr. *Wright* was attending court during the term, and on the 5th of *November*, trying to make an arrangement with *Hawk*, having offered to take security to the amount of two hundred dollars for the bond and give him time, so that he might not be compelled to take the benefit of the act. To this evidence the counsel for the plaintiff objected, but the court overruled the objection; and the admission of this evidence, formed the subject of three bills of exceptions, the substantial parts of which, for the sake of brevity, are thrown together.

When the evidence was closed the court instructed the jury as follows: "the continuation of *Hawk's* case on Monday the 4th of *November*, by the court generally without fixing any particular day during the term for the hearing of the case, was a good and legal continuance, and his discharge on the 7th day of *November*, was such a one as discharged the bond. It is the practice of this court, at every term, to continue the insolvent cases generally during the term, when the insolvent does not appear on the day appointed for the hearing of his cause."

The counsel for the plaintiff excepted to the charge of the court also, in which, as well as in the admission of the evidence above stated, error was assigned, on the removal of the record to this court.

Wright and *Norris*, for the plaintiff in error,

Weidman and *Elder*, for the defendants in error.

The opinion of the court was delivered by

DUNCAN, J. The plaintiff insists, that inasmuch as it does not appear by the record, that *Hawk* did appear on the first day of the term, the bond is forfeited, and the bail has become liable. If this be so, it is a matter of the strictest law, and an exaction of great rigour; for it does appear, that the party having the beneficial interest, had notice that the insolvent was not discharged on the first day of the term, and endeavoured to obtain from him security for a part of his debt, persuading him not to take the benefit of the act.

Looking at the state of the record, and not inquiring further,

(Sheets v. Hawk and another.)

the condition would appear to have been complied with. The term is but one day, in strictness. Continuances from day to day are not usually entered as continuances from term to term are. Where, as in the city of *Philadelphia*, hundreds sometimes are to come out on the same day, on notices to appear on the same day, they cannot be all discharged. Indeed, the common routine of business generally occupies the first day:—empannelling the grand jury, charge to the grand jury, calling and receiving returns of constables, forfeiting the recognizances of parties and witnesses who do not appear; and I believe that it rarely occurs, that the Court of Common Pleas begin to act on the first day of their session. It must be presumed, unless the contrary appear by the record, that the party complied with all things required by law to entitle him to be discharged, and generally abode all orders of the court. *Omnia presumantur rite acta*. The court was competent to discharge,—they have discharged, they have decided that the insolvent has complied with all things required by law to entitle him to his discharge,—that he has abode by all orders of the court, and this is all the bond covenanted he should do.

Now, as it appears on the record that the court had jurisdiction to discharge, and as they have exercised that legitimate power, it cannot consist with the general analogy of the law, that in a collateral action there can be *any inquiry* on the facts which they have decided. The record is as conclusive in that case as it is in any other of which they have jurisdiction. It was not a nullity. The insolvent debtor, with that discharge in his hand, was free from arrest. He was discharged by competent authority. In *Lester v. Thompson*, 1 *Johns. Rep.* 300, it was determined, that the discharge of an insolvent debtor was conclusive as to the facts. If this cause went back on the part of the plaintiff, because his exception is, that the whole must depend on the record of the court, and on the record he has no case. But the evidence excepted to, although unnecessary, did not go to contradict the record, and I think the court may inquire of their own officers, and attorneys are officers of the court in this respect, what the course of business is. The proof of that practice was, that on an application of the attorney of an insolvent debtor, the court will postpone the day of hearing, and continue it from day to day during the term; and the attorney of the insolvent debtor proved the fact, that the case of this insolvent debtor was continued from day to day; and if even it had been necessary that the continuance should appear of record, the court would direct the prothonotary at any time so to amend the record, by the insertion of the order for continuance; for the attorney of the insolvent swears, that the court, on *Hawk's* not appearing, on his application, continued the hearing from day to day. The court had authority so to do. We are not now to inquire why they exercised this discretion. The reason for the continu-

(Sheets v. Hawk and another.)

ance is never stated on the record, and if it was, this court, in this indirect manner, cannot reverse the sentence of discharge, though they might conceive that the reason for granting the continuance was not a sufficient one. The insolvent might have been taken sick, or broken his leg in his way to the court; the waters might have been impassable; many accidents might have occurred to have made it the duty of the court to continue the hearing, and we must suppose the court has done its duty.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

WILSON *against* IRWIN and another, Administrators of
M'CLAY, for the use of HOWARD.

IN ERROR.

If in a suit on a bond given to two persons as administrators, the instrument declared upon correspond with that given in evidence, but the declaration state it to have been assigned by both obligees, when in fact it appears to have been assigned by one only, this is not a variance for which the judgment will be reversed.

Where the defendant neglects to give the notice of special matter required by a rule of court, the admission of other evidence, without objection by the plaintiff, will not entitle the defendant to give in evidence, that of which he ought to have given notice.

Nor can he, by setting out in the form of a plea of set-off, the special matter which he might have given in evidence under the plea of payment with leave, &c. if notice had been given, either give such special matter in evidence or entitle himself to a continuance. It is not error to refuse to permit such a plea to be added.

WRIT of error to the Court of Common Pleas of *Dauphin* county, in an action on a bond given by *George Wilson*, the plaintiff in error, and defendant below, to *John Irwin and John Lyons*, administrators of *William M'Clay* deceased, the defendants in error, and plaintiffs below. The bond was equitably assigned by *John Irwin* alone to *Joseph Howard*, for whose use the suit was brought.

The cause was argued by *Elder*, for the plaintiff in error, and by *Harris and Forster*, for the defendants in error; after which the opinion of the court, in which the case is sufficiently stated, was delivered by

ROGERS, J. This suit is brought upon a bond to which defendant pleads payment with leave, &c. Replication, *non solvit* and issue; on which state of the pleadings the parties went to trial.

The plaintiff, to maintain his case, offered in evidence the bond, on which the suit was brought, to which the defendant objected generally, and now assigns for error, that the bond varies from the instrument declared on. The plea of payment admits the execu-

(Wilson v. Irwin and another, Administrators of McClay, for the use of Howard.)

tion of the bond, but if it should satisfactorily appear to the court that it is not the same instrument mentioned in the plaintiff's statement, it would be the duty of the court to reject the evidence. This however is not the case here. The statement and the bond offered in evidence have the same parties, the same sum and the same date. Nor can I believe that the assignment being stated to have been made by *John Irwin and John Lyons*, when in truth it was made by *John Irwin* alone, would justify the court in reversing the judgment rendered in this case. This judgment could be pleaded in bar, and would avail the defendant in a subsequent suit brought upon this bond. I cannot doubt, that the bond offered in evidence, and the bond declared on are one and the same instrument. In the course of the trial, certain testimony which it is immaterial here to state, was rejected because the defendant had failed to comply with a rule of Court, which requires that notice should be given to the adverse party of the special matter on which the defendant intends to rely. It would be worse than useless for a court to make rules, unless they are enforced, and certain it is, that the court which makes them is the best judge of their construction.

Here there can be no doubt that the decision of the court was correct; nor will the admission of other evidence, without objection, vary the rule. For the purpose of obviating the objection of want of notice, the defendant offered a plea, which he calls a plea of set-off, but which is merely a more formal mode of setting out his special matter, and which might have been given in evidence under the plea of payment with leave, &c. It is an ingenious device, to cure the omission of want of notice. To have permitted him to do this, would be enabling him to do indirectly, what the court said he could not do directly. He would have been permitted to have given the evidence before rejected, or he would have succeeded in procuring a continuance of the cause.

The court, exercising a sound discretion, and believing there was no such informality in the pleadings as would affect the merits of the cause in controversy, refused to permit the plea to be added, and in that there was no error.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

BOYER *against* KENDALL, Administrator of KENDALL.

IN ERROR.

The creditor of a deceased person may be a witness for his personal representative, where it does not appear with certainty that the estate is insolvent.

THIS was a writ of error to the Common Pleas of *Berks* county, in which court, the defendant in error, *Joseph Kendall*, administrator of *Samuel Kendall*, deceased, brought suit against *Jacob K. Boyer*, the plaintiff in error.

On the trial, the plaintiff offered *John Miller* as a witness, who being sworn on his *voire dire*, said, "I have a small claim on *Samuel Kendall's* estate of about twenty dollars on book account. I don't think the estate is sufficient to pay the debts. *John Kendall's* and *Elisha Geigers's* estates have each a large claim on the estate of *Samuel Kendall*, amounting to about ten thousand dollars. If *Mr. Boyer* establishes his claim in this action, the estate of *Samuel Kendall* will not be sufficient to pay all the claims, unless there is more property than I know of." This testimony was objected to by the counsel for the defendant, and admitted by the court, which was the only error assigned.

Baird and Hayes for the plaintiff in error.—*Miller* was not a competent witness, because no man can be a witness to increase a fund in which he is to participate. Therefore a bankrupt cannot be a witness to increase his estate; nor a residuary devisee to increase the fund; nor a specific legatee to disprove a claim against the estate of the testator; nor can an heir be a witness for the administrator in an action against a debtor of the estate. 1 *Phill. Ev.* 51. (note c.) 14 *John* 146. 2 *Day* 466. 2 *Munf.* 452. 1 *Mass. Rep.* 239. 1 *Dall.* 62. 2 *Dall.* 50. 4 *Mass. Rep.* 518.

Darling for the defendant in error, relied on the opinion of this court in *Youst v. Martin*. 3 *Serg. & Rawle*, 423. He observed, that it was by no means clear that the estate of *Samuel Kendall* was insolvent. No administration account had been settled, and of course it was not ascertained that there was not enough to pay all the debts. The witness merely said, that the estate would fall short, unless there was more property than he knew of.

The opinion of the court was delivered by

ROGERS, J. Every creditor has an interest more or less to increase the funds of his debtor, as it adds to the security of his debt, and yet there is no doubt that a creditor is a witness either for the debtor himself or his personal representatives. It has been decided in 12 *Mod.* 385. *Crow v. Brown*, "That a legatee may be admitted to prove assets in the hands of the executor, in a suit

(*Boyer v. Kendall, Administrator of Kendall.*)

by a creditor." And in that case it is conceded that one creditor may be admitted to prove assets in an action by another creditor. *Miller* does not acknowledge any expectation that he will be bettered by the fate of the cause, nor does he say that he believes that the payment of his debt, depends upon the event of the suit, so as to bring the case within the principle decided in *Innis v. Miller*, 2 *Dall.* 50. All he states is, "that he is a creditor for twenty dollars,—that the estate is not sufficient to pay the debts—and that if *Boyer* establishes his claim, the estate will not be sufficient to pay all claims unless there is more property than he knows of."

If *Miller* be incompetent, it must be because they have brought him within the exception to the rule, that a creditor shall not be excluded from giving testimony, as such. This exception should not depend upon evidence, which in its nature is uncertain, and which would lead to an inquiry expensive and dilatory. Indeed in many cases it would be impossible to ascertain the situation of the estate, until final settlement. Let the exception then, be rather to his credit than his competency. The jury under the direction of the court will be fully able, under the circumstances of each case, to do justice to the parties.

In general, the creditor of a deceased person may be a witness although his testimony tends to increase the estate of the deceased. 3 *Serg. & Rawle*, 427.

The exceptions to the rule are cases of bankruptcy or notorious insolvency, such as a voluntary assignment for the benefit of creditors or a discharge under the act for the relief of insolvent debtors. In those cases he is excluded, because he has a legal fixed interest in the event of the suit, his testimony, going directly to increase the divisible fund of the bankrupt or insolvent.

Judgment affirmed.

[LANCASTER, MAY 24, 1826.]

DOEBLER and Others *against* FISHER.

IN ERROR.

Evidence that a horse was received by the defendant in exchange for a patent right, is not admissible, either under a count for money paid laid out and expended, or for money had and received.

ERROR to *Lebanon* county.

The defendant in error, *Samuel Fisher*, brought this action of assumpsit in the court below, against *Abraham Doebler* and *Joseph Reinhart*, the plaintiffs in error; and filed a declaration which contained two counts. The first was for money paid, laid out, and expended. The second, for money had and received. The

(Doebler and others v. Fisher.)

verdict was taken generally for the plaintiff, but after the jury had left the bar and a motion had been made for a new trial, the verdict was, from the judges' notes, entered on the second count. This was objected to in this court as error; but the Chief Justice having intimated that it was often done, the objection was abandoned.

On the trial of the cause, the plaintiff offered in evidence a deposition of *George Miller*, who, after stating that he was present when the plaintiff and defendants bargained about a patent right to bleach linen and cotton, and what the defendants were to do, was asked by the plaintiff "Do you know what compensation I gave for the patent?" The witness answered, "Yes; I do know that you delivered the same men a sorrel horse, and he was a good horse, and handsome." The plaintiff then asked the witness, "How much was the horse worth, or how much do you think he would sell for?" To which he answered, "I think the horse was worth one hundred and fifty dollars at least, for he was an elegant horse."

To the reading of this deposition several exceptions were taken by the defendants' counsel, in the court below, all of which it is unnecessary to state, as the following was the only one considered available by this court: viz. That the special contract should have been set out, and that the deposition proving that the defendants had received a horse, was not evidence under either count in the declaration.

The deposition having been admitted by the court, a bill of exceptions was tendered and sealed.

Weidman and *Norris*, for the plaintiffs in error, cited 1 *John*. 96. 8 *John*. 439. 1 *Chitty*, on *Pl*. 288.

Elder, for the defendant in error, referred to *Kelly v. Foster*, 2 *Binn*. 4.

HUSTON, J. after stating the case, delivered the opinion of the court as follows:

Was the deposition evidence on either count in this declaration? Not on the first; for there, except in certain cases, the having given a negotiable note, nothing but the actual expenditure of money will be admitted. Giving a bond for the debt of another will not support this count—of course giving property will not.

A count for money had and received has been supported without positive proof that money has been actually received, as, where goods were left a long time ago in a store to be sold—and the store-keeper would not produce them nor pay the price, it has been left to a jury to presume that the store-keeper had received the price of them. 8 *John*. 202. 9 *Serg. & Rawle*, 11. The case before the court differs in this—the horse was given absolutely in exchange for the patent right, to be kept as the party's own property, not delivered to be sold, or the price of him accounted for in any way—no price was put on the horse by the parties. The witness

(Doebler and others v. Fisher.)

thought him worth one hundred and fifty dollars. It was not proved nor offered to be proved that the horse had been sold and turned into money. No case has been cited to show that receiving a horse will support a count for receiving money.

It has been decided in New York, that an attorney or agent duly authorised to receive money and give an acquittance, who gives a receipt and discharges a debtor, is liable to an action for money had and received for his principal, and that he shall not discharge himself by proving, that in fact he received no money. 11 *Johns*. 464. It would seem his own receipt concludes him. The same point has been decided in *Massachusetts*—but I have found no case where receiving goods has been held sufficient. On the other hand there is an express decision that receiving India stock, will not support such count. 5 *Burr*. 2589. It was offering to prove what was not stated in the declaration, and what would not support it if proved, and therefore ought not to have been received.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 24, 1826.]

The President of the Orphans Court of *Dauphin* county, for the use of GROFF against GROFF and another.

IN ERROR.

A recognizance entered into in the Orphans' Court, by the son of a testator, conditioned for the payment to his other children of their shares of a certain real estate, which the testator by his will directed should be appraised on the arrival of the son at the age of 21 years, and that if he chose to take it at the appraisement he might do so on giving security to the other children of the testator, is not within the provisions of any act of assembly, and no action can be supported upon it.

If the land for which a recognizance is given in the Orphans' Court, is sold under an order of that court for the payment of debts, it is a good defence to an action on the recognizance.

A decree of the Orphans' Court, unreversed and unappealed from, cannot be questioned in a collateral suit, except in cases of fraud or when the defect plainly appears on the face of the proceedings. And where a party relies upon fraud, it ought to be distinctly and positively alleged, and not inferred merely from circumstances.

On a writ of error to the District Court of *Dauphin* county, it appeared that this was an action brought upon a recognizance given by the defendants in error, who were also defendants below, to the President of the Orphans' Court of *Dauphin* county, under the following circumstances:

Jonas Groff, made his last will and testament, and among other things directed,—that when his son *Henry* arrived at the age of 21 years, a certain place mentioned in his will, should be appraised, and that if his son *Henry* chose to take the place at the appraisement, he might do so, upon giving security to the other children,

(The President of the Orphans' Court of Dauphin county for the use of Groff
v. Groff and another.)

for their shares." After *Henry* had attained the age of 21 years, viz. on the 24th day of *March*, 1814, he exhibited his petition to the Orphans' Court for the county of *Dauphin*, setting forth the will of his father, whereupon the court ordered an inquest, to value and appraise the land, agreeably to the prayer of the petitioner. The property was appraised at the sum of five thousand dollars and upwards. *Henry Groff* took the property at the appraisement, and entered into a recognizance with *Henry Plant*, his security, whereby each became bound to the Honourable *WALTER FRANKLIN*, Esq., President of the Orphans' Court of *Dauphin* county, and his successors in office, in the sum of ten thousand dollars, conditioned to pay to the widow and other heirs and legal representatives, their several and respective shares of the valuation of the said estate. This suit was brought upon the recognizance, in the name of the Honourable *SAMUEL D. FRANKS*, President of the Orphans' Court of *Dauphin* county, successor of *DAVID SCOTT*, &c. successor of *WALTER FRANKLIN*, against *Henry Groff* and *Henry Plant*.

The defendants pleaded payment, with leave, &c. and upon the trial of the cause, the plaintiffs gave in evidence, the will of *Jonas Groff* the father, and the record of the Orphans' Court, and rested. The defendants then gave in evidence, the administration account of *Thomas Wenrich*, the executor of *Jonas Groff*, on which it appeared, that there was a balance of nine hundred and fifty-seven dollars, twenty-seven cents, against the estate, and in favour of the accountant; a petition of *Thomas Wenrich*, for an order of sale to pay said balance; the order of sale, and the decree of the court confirming the sale to *Henry Plant*, the purchaser of the land heretofore taken by *Henry Groff* at the appraisement.

The plaintiffs then offered to prove, that this balance of nine hundred and fifty-seven dollars and twenty-six cents, in the administration account, was made up of debts contracted by *Thomas Wenrich*, the executor, in the purchase of real estate in *Mifflin* county, without the consent of the plaintiffs in this cause, who were minors, and under the age of 14 years, and who had no guardians appointed by the Orphans' Court, who would act; that this fact was known to the executor, not only at the time he settled his administration account, but at the time he procured the sale, and that some of them were still minors. They also offered to prove, that there were more assets in the hands of the executor at the death of the testator, than would pay all his debts; that the defendants were fully acquainted with these circumstances, and had full notice thereof before and at the time of the said sale, and also that the purchaser of this estate was one of the defendants and one of the recognizers in this cause. They further offered to prove that all the debts of the testator were paid by the executor seven years before the said estate was appraised and taken by the recognizer, *Henry Groff*.

(The President of the Orphans' Court of Dauphin county, for the use of Groff v. Groff and another.)

For the rejection of this testimony by the District Court, a bill of exceptions was tendered and sealed, which was now assigned for error in this court.

Elder, for the plaintiffs in error, referred to the act of the 19th of April, 1794. 3 Sm. L. 150. Act of the 1st of April, 1811. 5 Sm. L. 258. *Messinger v. Kintner*, 4 Binn. 97. *Larrimer v. Irwin*, cited by TILGHMAN, C. J. 4 Binn. 104. *Snyder v. Snyder*, 6 Binn. 499. *Selin v. Snyder*, 7 Serg. & Rawle, 172.

Elder, for the defendants in error, cited *Smith v. Lewis*, 3 Johns. 168. Act of the 8th of February, 1819. *Purd. Dig.* 618. *Elliott v. Elliott*, 5 Binn. 1. 3 Ba. ab. 587. (*Wils. Ed.*)

ROGERS, J. (after stating the case) delivered the opinion of the court as follows:

The more correct manner of introducing the first question for consideration, would have been, by a plea of *nul tiel* record. The question, however fairly arises on the face of the record; which is, whether any suit can be sustained, on the recognizance taken in the Orphans' Court, under the circumstances stated? The inquest and appraisement were in pursuance of the directions of an act of assembly, relating solely to intestates, and not to cases of testacy. The Orphan's Court has never been considered a court of general jurisdiction. They have no power, unless given by act of assembly, and no law has been produced giving them the authority exercised in this case. The will of *Jonas Groff*, directs that the land shall be appraised, but not by whom, nor in what manner. As then it appears on the record, that this was a proceeding not warranted by any act of assembly, it is the opinion of the court, that this recognizance is totally void. It has however been ingeniously contended, that although void as a recognizance, yet it may be supported as a stipulation between the parties. Without expressing any opinion on this point, it may be sufficient to observe, that the plaintiffs have not so considered it, in this action, but have brought their *scire facias*, upon a void recognizance, in the name of the President of the Orphan's Court, successor of WALTER FRANKLIN, against the present defendants. They cannot now be permitted to turn round, and sustain themselves, by alleging that it is a stipulation and not a recognizance.

The defence relied upon in the District Court was that the lands for which the recognizance was taken, had been subsequently sold, under an order of the Orphan's Court, to pay the debts of *Jonas Groff*, the testator. If this were so, it would be most manifestly unjust, that the recognizers should be bound to pay the money, when they had lost the land, and more especially when the land had been sold under the decree of the Orphan's Court for the payment of the debts of the testator. To avoid this decree, directing and confirming the sale of this land, the evidence, which has been

(The President of the Orphan's Court of Dauphin county for the use of Groff v. Groff and another.)

particularly and specially detailed, was offered by the plaintiffs.

There is no principle better settled, than that the judgment or decree of a court of competent jurisdiction, cannot be questioned in a collateral suit. Here *Thomas Wenrich* the executor, settled his administration account, in which there was a balance of nine hundred and fifty-seven dollars and twenty-six cents against the estate, and in favour of the accountant. To pay these debts, on the petition of *Thomas Wenrich*, the court ordered a sale of the lands of the testator, which sale has been confirmed by the Orphan's Court. This decree, remaining unreversed, and unappealed from, the District Court were asked by the parties to the decree, to review the proceedings. To permit this would render uncertain the most solemn acts of a court of justice, if at any time, they would be liable to an investigation by parol testimony in a collateral suit. When aggrieved, the parties should appeal, or reverse the proceedings. And in this case, it is no answer to say, that they were minors, and that the guardians would not act. If the guardians neglected or refused to do their duty, it is a matter between them and their wards, with which we have nothing to do in this suit.

Without particularly examining the cases of *Messinger v. Kinter*, 4 Binn. 105. *The Lessee of Snyder v. Snyder*, 6 Binn. 483. and a late case, decided at *Pittsburg*, *McPherson v. Cunniff*, 11 *Serg. & Rawle*, 422, or expressing any opinion how far these cases are reconcileable with each other, I think I may with the utmost safety say, that a decree of an Orphan's Court, unreversed and unappealed from, cannot be questioned in a collateral suit, unless in cases of fraud, or where the defect plainly appears upon the face of the proceedings themselves.

In this case, it cannot but be observed, that there is no allegation of fraud. It is left to be inferred from the circumstances. Whenever a party relies upon fraud, it ought to be distinctly and positively alleged, upon the first principles of justice, that the person to be affected may have a full opportunity of meeting and disproving the charge.

As then, there was no allegation of fraud, and the decree of the Orphan's Court was good on its face, unreversed and unappealed from, I am of opinion, there was no error, in refusing the evidence, contained in the plaintiffs bill of exceptions.

Judgment affirmed.*

* The following opinion of Judge WASHINGTON, delivered on the Equity side of the Circuit Court of the United States, for the Eastern District of Pennsylvania, is in accordance with the principles established by this court.

Thomas M. Blount v. Thomas Darrach, and Thomas Bradford, jr.

The bill stated that the plaintiff was the husband of *Elizabeth Knight*, the daughter of *Daniel B. Knight*, formerly of *Philadelphía* county, who, on the 22d of April, 1808, conveyed to *James Darrach*, *Thomas Bradford*, and *John Boiren*, a certain

[LANCASTER, MAY 24, 1826.]

Appeal by JOHN WITHERS from a decree of the ORPHANS' COURT of Lancaster County.

APPEAL.

The interest of a child in the land of his deceased father, continues to be real estate, after an order has been granted to the administrator to make sale of it and until it is actually sold, and cannot, by any parol agreement, be converted into personal estate, so as to effect the lien of a third person.

Therefore, a parol agreement by the son of a decedent, that his brother, who had advanced money for him, and who afterwards as administrator of the father, obtained an order of the Orphans' Court for the sale of his real estate, should repay himself out of his brother's share of the proceeds of the land, when it should be sold, will not prevail against a judgment, obtained after the agreement was made, and before the sale took place, by a third person, who had no knowledge of the agreement.

THIS case came before the court on an appeal by *John Withers*, from the decree of the Orphans' Court of *Lancaster* county, on a

real estate in trust for himself for life, and after his death, to the use of his said daughter *Elizabeth*, in fee tail, and in default of issue, to the use of the children of *Michael Knight* and his sister *Elizabeth*, as tenants in common, in tail, and in default of such issue, then to the use of the children of *Daniel P. Knight* and his heirs: That the said *Daniel P. Knight* died in the year 1809, leaving his said daughter a minor, to whom the aforesaid *James Darrach* was appointed guardian, and who continued to act as such until his death: That after his death, his executor, *E. Darrach*, filed an account of the guardianship of his testator, in the Orphans' Court, for the city and county of *Philadelphia*, and auditors were appointed to audit and settle the same, who reported a balance to be due to the said infant *Elizabeth Knight*, by the estate of her late guardian, of \$1,897, to the first of *February*, 1816: That of this balance the executors paid to *Wm. Bradford, jr.* who had been appointed the guardian to the said *Elizabeth*, after the death of *James Darrach*, the sum of \$1,798, 49, on the 9th of *November*, 1819: That at the time of the aforesaid settlement of the said guardianship account, the said *Elizabeth* was an infant, and no attention to the said settlement, was paid by her guardian, *Wm. Bradford, jr.*

The bill then charged that the account so settled, was replete with errors and omissions, particularly in the following instances: 1st. That no interest was credited the ward on the sums received by her said guardian from the commencement of the account to the 1st of *February*, 1815. 2d. That no rents were credited for a house, No. 361 North Front Street, in the *Northern Liberties*, except a small amount, much less than was received by her guardian, or if not received, they were lost by the negligence of her guardian. 3d. That there were various deficiencies in the account, as to rents of a wharf and lot in the *Northern Liberties*, and that the account throughout was imperfect. The bill called upon the defendants, the executors of *James Darrach*, to discover whether rents and other sums of money, belonging to the ward, were not received by their testator, beyond those which were credited in the aforesaid account; and whether divers sums of money did not remain in the hands of their testator from time to time, and whether no interest was allowed in the said settlement, and whether a sum of money was not withheld by the executors from her guardian, *Wm. Bradford*, under the pretence of the same being due by the said *Wm. Bradford*, in his individual capacity, to the estate of *James Darrach*,—to produce the books of their testator which contained any entries or accounts respecting the estate of his said ward. The prayer of the bill was for an account of the guardianship transactions of *James Darrach*.

To this bill the defendants filed a plea, setting forth that on the 20th of *October*, 1809, the Orphans' Court of the city and county of *Philadelphia*, on the petition of

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)
citation to *Michael Withers jr.* and others, to show cause why a certain judgment of *Michael Withers* and *Samuel Eshelman*, as-

the grandmother of the said *Elizabeth Knight*, then seven years of age, appointed *James Darrach* her guardian, the duties of which office he undertook and exercised until the time of his death, which happened on the 16th of *February*, 1816: That on the 17th of *September*, 1817, the said *Elizabeth*, being then of the age of 14 years, chose, and the Orphans' Court appointed, *Wm. Bradford, jr.* and *Thomas B. Darrach*, her guardians, who continued as such till she arrived at full age: That the defendants, as executors of *James Darrach*, filed, in the Orphan's Court, the account of their testator, of his guardianship of the said *Elizabeth*, and on the 19th of *July*, 1816, auditors were appointed by the said court, to settle and report on the said accounts: That one of the guardians of the said *Elizabeth* appeared before the auditors and examined the said account with the auditors, altered some of the items in it, charged interest on monies in the hands of the guardian, thereby increasing the balance due to the ward, which account, so altered and examined, was reported to the said court, and was by the decree of the said court allowed and confirmed, and the same remained unappealed from and unreversed on error, which settlement, report and decrees, the defendants, after protesting that there are no errors in the same, pleaded in bar of the bill and of the account and discovery thereby prayed.

Bayard and *J. R. Ingersoll*, for the complainant.

Dwight and *T. Sergeant* for the defendants.

WASHINGTON, J. This cause having been set down to be argued on the plea, the allegations contained in it must all be taken as true. The case which the plea presents is, that after the death of *James Darrach*, the guardian, whose accounts the bill seeks a settlement of, his executors filed in the Orphans' Court the guardianship account of their testator, which was by order of that court referred to auditors to settle and report. That one of the guardians of the then minor, in whose right this suit is brought, who had been previously appointed to that office by the Orphans' Court, appeared before the auditors, and examined the account filed by the executors, as also the vouchers, altered some of the items, charged interest on monies in the hands of the guardian belonging to his ward, thereby increasing the balance in favour of the ward, and that the account thus examined, altered and settled, was reported by the auditors to the Orphans' Court, where, by a decree of the said court, it was allowed and confirmed, and that the said decree remains unappealed from and unreversed on error. The plea further alleges, that *James Darrach* did not, in his lifetime, nor have the defendants since his death, received any monies belonging to the estate of the plaintiff's wife, other than those credited in the defendants' account, and that the balance due on that account, has been fully paid and satisfied.

The single question which arises upon the above facts is, whether the account of the guardianship of *James Darrach*, which, by the decree of the Orphans' Court was allowed and confirmed, is conclusive or not, so as to be a bar in the discovery and relief sought to be enforced by this bill?

The general principles of law in respect to the conclusiveness of the judgments and decrees of the domestic tribunals of the county are well settled, and perfectly intelligible. A judgment or decree of a court of competent jurisdiction, directly upon the point, is conclusive between the same parties, or their privies upon the same matter coming directly in question in another court of concurrent jurisdiction. This rule is founded upon considerations, as well of abstract justice, as of public policy, which forbid the litigation of any matter which has been once fairly determined by proper and competent authority, between the same parties, or those standing in the relation of privies to them. If the matter, or the parties, be different, the former judgment or decree, if admitted in evidence at all, as in particular cases it may be, can be so only as *prima facie* evidence, but not conclusive. And so extensive and universal is this principle, that it includes the judgment or determination of tribunals having competent authority to decide, whether they be of record or not. Where the matter adjudicated is by a court of *peculiar and exclusive jurisdiction*, and the same matter comes incidentally before another court, the sentence of the former is conclusive upon the latter, as to the matter directly decided,

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)
 signees of *John Evans* against *Michael Withers, jr.* should not be paid first, but the said *Michael Withers, jr.*'s. share of the pro-

not only between the same parties, but against strangers. *Duchess of Kingston's Case*, 11 St. Tr. Stra. 481. *Doug.* 407. 2 H. Blac. 416. *Harg. Law Tracts*, 466.

The subjects of inquiry then in the present case are : Had the Orphan's Court jurisdiction of the matter on which they made their decree : Is that the same matter which this bill seeks to litigate in this court : Are the parties the same, or in privity with those who were parties in the Orphans' Court : And lastly, how far is that decree binding on the plaintiff in consideration of the infancy of *Elizabeth Knight* at the time it passed ?

1. By the act of assembly of 1713 of this state, " For establishing the Orphans' Court," they are declared to be courts of record, with power to call before them, executors, administrators, guardians and others who are intrusted with or accountable for, property real or personal belonging to any orphans, and cause them to exhibit true and perfect inventories and accounts of the said estate. By the 3rd section of this act, the Orphans' Court, upon complaint being made that any person having the care or trust of a minor's estate is like to prove insolvent, or shall refuse or neglect to exhibit true and perfect inventories, or to give full and just accounts of the estates come to their hands or knowledge, is required to cause such guardian or tutors of orphans, or minors, to give such security as the court may think proper. The 6th section provides that guardians shall not be liable for interest, but on the surplussage of the estate remaining in their hands or power, belonging to the minor, when the accounts of their administration are or ought to be settled and adjusted before the Orphans' Court, or register general respectively. The 8th section invests that court with a power to issue attachments for contempt against those who have been summoned to appear therein, and to enforce obedience to their warrants, sentences and orders concerning any matter cognizable therein as fully as any court of equity can do, the party aggrieved by any final sentence of the said court, being, by the succeeding section, allowed an appeal to the Supreme Court. The 11th section declares that, when any minor shall attain to full age, if the person intrusted or concerned for him as before mentioned, shall have rendered his accounts to the Orphans' Court according to the direction of this, and other acts, and paid the minor his full due, the minor shall acknowledge satisfaction in the said court, and if he refuse to do so, the court is required to certify how the said person concerned has accounted and paid, which shall be a sufficient discharge of the guardian, &c. who shall so account and pay, and thereupon his bond shall be delivered up and cancelled. By the 10th section of the act of 1807, where the personal estate of a minor is insufficient for his maintenance and education, the Orphans' Court may allow the guardian to sell so much of the real estate as may be necessary for those purposes ; and, in a note to *Smith's* edition of the laws, vol. 1. p. 37, he observes that the persons directed to sell are most commonly obliged by the acts authorizing the sale, to exhibit their accounts for settlements in the Orphans' Court.

Upon a view of the above provisions respecting the Orphans' Court, I could not entertain a doubt, were the question now before me for judgment for the first time, that that court has jurisdiction to settle, and to allow, and confirm the accounts of guardians, and finally to decide upon the different items of those accounts, subject to the reversing and correcting jurisdiction of the Supreme Court. But if this point were at all doubtful, I take it to be settled by the decision of the Supreme Court in *Richards's* case, 6 Serg. & Rawle, 462. That case came on upon a rule to show cause why the ward should not be permitted to appeal on giving security for costs only; in which it was decided, that an order of confirmation by the Orphans' Court, of a report of auditors on the final settlement of a guardian's account, is a final decree, but that that court has no authority to go further, and to decree payment of a balance from the ward to the guardian on such settlement. " It is going far enough," observes the learned judge, who delivered the opinion of the court, " to say the confirmation of the account shall discharge the guardian, without directly involving the ward in personal liability." It is added, " the Orphans' Court is *ex officio* the protector of the ward, and interferes no further than to compel the guardian to account with him."

2. The next inquiry is, whether the matter decreed by the Orphans' Court, is the same which this bill seeks to litigate ? Upon this subject there can be no

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)
ceeds of his father's estate, sold by his administrators under an order of the Orphans' Court.

The facts, as they appeared in a case stated, were these:

A certain *Matthew Irwin* having arrested *Michael Withers, jr.* on a *capias ad respondendum*, for the use of *H. B. Griffiths*, special bail was entered by *Christian Sheek*, who afterwards took out a bail piece and arrested the said *Michael Withers, jr.* thereon. At the request of *Michael Withers, jr.*, his brother, *John Withers*, undertook to indemnify *Sheek*, for having become bail for *Michael*, provided he would discharge him from arrest on the bail piece, which was accordingly done. *Michael* at the same time promised to indemnify *John* for the engagement he had entered

doubt. The matter presented to that court by the executors of *James Darrach*, for its consideration and decision, was the guardianship accounts of the testator, of the estate of his ward, *Elizabeth Knight*. That account was referred by the court to auditors, who made their report, stating the balance due by the defendant to his late ward; and this report was by a decree of the court allowed and confirmed. The object of this bill is to open that account, for the purpose of enabling the plaintiff to surcharge and falsify it in the particulars stated in the bill. The prayer of the bill, both as to discovery and relief, is confined to that object.

3. The next inquiry is, was *Elizabeth Knight*, in whose right the plaintiff claims, a party to the proceedings in that court, upon which the decree of confirmation was passed?

The plaintiff states that her guardian, duly appointed by the Orphans' Court, appeared before the auditors, litigated the account presented by the executors, and by objections successfully made to some of its items, increased the balance, which was finally reported and decreed in favour of his ward. Will it be doubted that he legally represented his ward, so as to make her a party to the proceedings before that court? By the 7th section of the act of 1713, before referred to, 1 *Smith*, 84, the Orphans' Court are authorized to appoint guardians, next friends or tutors over minors, who shall be allowed and received, without further admittance, to prosecute and defend all actions and suits relating to the orphans or minors in any court of the province.

Lastly, it is to be seen how far the decree of the Orphans' Court, made during the minority of *Elizabeth Knight*, is binding upon her, or upon those claiming in her right.

The general rule of the courts of equity is, that no decree can be made *against* an infant, without giving him a day to show cause, after he comes of age. When he is plaintiff, he is, unless under extraordinary circumstances, as much bound by a decree, and as little privileged as an adult. And even in the former case, he will not be permitted to travel into the account, or where a foreclosure has been decreed, to redeem by paying what is reported due, but is only allowed to show an error in the decree. If, at law, he suffer a recovery, he is so far bound, that he cannot enter on the land until he has reversed the judgment upon writ of error.

It is probable that, in this case, the plaintiff, in right of his wife, might be permitted in the Orphans' Court to show cause against the decree of that court, rendered during her infancy, by showing specific errors in the account; or that the subject might be re-examined in the Supreme Court by appeal or writ of error. As to this matter, however, it would not become me to give an opinion. But it is clear to my mind, beyond all question, that the correctness of the decree of the Orphans' Court cannot be examined into by this court, which can only claim to exercise a concurrent jurisdiction, to compel guardians to settle their accounts, where they have not done so before some other competent forum.

The plea therefore averring that the balance decreed by the Orphans' Court has been paid, and relying upon that decree in bar of the other parts of the bill, is, what it professes to be, an answer to the whole bill; and consequently I must decree the bill to be dismissed with costs, but without prejudice to any remedy which the plaintiff may think fit to pursue elsewhere.

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.) into on his behalf. *Christian Sheek* having been sued as special bail of *Michael Withers, jr.* and compelled to pay the debt interest and costs, brought suit against *John Withers* on his promise of indemnity in the Common Pleas of *Lancaster* county, to *January* term, 1813, obtained judgment and issued an execution against him. Of this judgment and execution *John Withers* gave notice to *Michael Withers, jr.* and requested him to pay the money. *Michael* acknowledged the obligation he was under to pay the money, but his embarrassments prevented him from doing so. *John Withers*, the father of *Michael* and *John*, died in *December*, 1813, as was supposed for some time, intestate, leaving nine children. *John* and *Jacob Withers* took out letters of administration on their father's estate, and on the 22d of *March*, 1814, the Orphans' Court of *Lancaster* county granted an order to the administrators to sell such parts of the real estate as the heirs had declined taking at the appraisement. On or about the first of *April* following, it was agreed between *John* and *Michael*, that *John* should pay off the judgment obtained against him by *Sheek*, and to indemnify himself, retain the amount of it out of *Michael's* share of the proceeds of his father's estate, when the sale should take place. In pursuance of this agreement, *John*, on the 5th of *July*, 1814, paid to the sheriff the sum of one thousand two hundred and sixty dollars and seventy-three cents, the amount of the debt, interest and costs indorsed upon the execution. In consequence of the wish of the heirs of *John Withers*, deceased, that the property should not be sold, and the discovery of a paper purporting to be his will, the sale did not take place at the time appointed; but some time afterwards, the heirs, (some of whom were the devisees) of *John Withers*, agreed to consider the will as a nullity and that he had died intestate. Part of the real estate was then sold and applied to the payment of debts and the residue was sold in the year 1821. The money produced by the sale was paid into court, to be applied as the court should direct. *Michael Withers, jr.* was insolvent.

On the 4th of *October*, 1814, *John Evans*, obtained a judgment against *Michael Withers, jr.* for one thousand eight hundred and thirty-eight dollars and forty-five cents, the greater part of which he discharged.

On the 8th of *August*, 1815, *Evans* assigned the residue of this judgment to *Michael Withers* and *Samuel Eshelman*, the latter of whom survived the former.

The facts set forth in the case stated, so far as they depended upon parol evidence, were derived solely from the deposition of *Michael Withers, jr.*, to whose testimony the counsel for *Eshelman* objected, on the ground that he was interested, notwithstanding he had been released by *John Withers*. This deposition was read on the argument in this court; and contained some matters not mentioned in the case; but it is not necessary, in order to understand the opinion of the court, that they should be here stated.

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)

The amount of the share of *Michael Withers*, jr. remaining in court was about seven hundred dollars, which *Samuel Eshelman* claimed to have applied to the satisfaction of his judgment, while *John Withers* claimed it under the agreement with his brother *Michael*.

The Orphans' Court decided, "that *John Withers* had no lien for the amount of his claim, and that the judgment of *Evans* for the use of *Samuel Eshelman*, was entitled to payment in preference."

From this decree *John Withers* entered an appeal to the Supreme Court.

Hopkins, for the appellant. When *John Withers* paid the money, for which he had been sued, in consequence of his engagement to indemnify the bail of his brother *Michael*, he had a meritorious claim against *Michael*, which *Michael* directed him to satisfy out of his share of the proceeds of the sale of his father's real estate, which was to come into the hands of *John*, as one of the administrators of his father. *Michael* was entitled to one ninth of his father's real estate, and had a right to dispose of it as he thought proper. *Evans'* judgment against him was entered on the 4th of *October*, 1814, prior to which, viz. on the 1st of *April*, 1814, *Michael* had agreed with *John* to appropriate his share of the proceeds to the payment of *John's* claim against him. Though the land was not actually sold until long afterwards, yet it was to be considered as money from the time this agreement was made. The children had previously refused to take their father's land at the appraisal, and the Orphans' Court, at their request, granted an order of sale. *Michael* was the absolute owner of his share. That share was to be money, and therefore the fund out of which it was to be raised was money. Land agreed to be sold is considered as money. *Yohe v. Barnet*, 1 Binn. 358. 2 *Powell on Cont.* 83. If the agreement had been in writing, then no doubt it would have been good against a subsequent judgment creditor, and yet the writing would have been no more a conveyance of the legal estate, than the parol agreement. The legal estate was not necessary to make the appropriation valid. This court uniformly proceeds according to the rules of equity, and equity considers an executory contract as executed, from the time the agreement is executed. *Powell on Cont.* 55, 56. *McCall v. Lenox*, 9 *Serg. & Rawle*, 302. The statute of frauds cannot affect this case. On the faith of this agreement, *John Withers* paid money to *Christian Sheek*, the bail of his brother *Michael*, who had obtained judgment and taken out execution against *John*, upon his engagement to indemnify him as the bail of *Michael*. It was a parol agreement carried into complete effect on one side by payment of the full consideration money, and is not affected by the statute of frauds. From the time of making the agreement *Michael* was trustee for his brother *John*. Chancery would, under the circumstances of this case, decree the

(Appeal of John Withers from a decree of the Orphans' Court of Lancaster county.)
execution of the agreement. 2 *Fonb.* 49, note c. 2 *Vern.* 151.
1 *Powel on Cont.* 292. 1 *Madd. Ch.* 301, 302. 3 *Atk.* 4.

4. If *Michael* had sued *John* for one-ninth of the proceeds of his father's estate, *John* might have set off this debt. *Jeffs v. Wood*, 2 *P. Wms.* 129. *Wain's assignees v. Bank of North America*, 8 *Serg. & Rawle*, 77. The judgment creditor has no better right than *Michael*, against whom the judgment was obtained. It was subsequent to the agreement, and bound the right of *Michael* such as it was, at the time, and this right was subject to the agreement. The case of *Finch v. The Earl of Winchelsea*, is much to the purpose. *A.* agreed to convey land to *B.* for a valuable consideration, and then confessed a judgment to *C.* The agreement shall be preferred to the judgment; the money paid was an adequate consideration. *Foster v. Foust*, 2 *Serg. & Rawle*, 11, went upon similar principles. It is no objection that the judgment creditor had no notice of the agreement, for he was not entitled to notice.

Park, contra. An execution was issued on *Evans'* judgment against *Michael Withers, jun.* which was returnable to *November*, Term, 1814, and was returned, levied on his share of his father's real estate, and on a house of his own. On the 8th of *August*, 1815, this judgment was assigned to *Michael Withers, sen.* and *Samuel Eshelman*, the sum then remaining due upon it being about equal to the share of *Michael Withers, jun.* of the proceeds of sale, remaining in the Orphans' Court. Of the parol agreement nothing was heard until the month of *January*, 1824, when application was made to the Orphans' Court, to permit *John Withers* to retain the money, in order to satisfy his claim. The only evidence of this agreement, is that of *Michael Withers, jun.* himself, who was not a competent witness, notwithstanding he was released. But if he was competent, he does not fix the time when the agreement was entered into, with any degree of certainty. He contradicts himself, first saying that the agreement was entered into after, and then before, *John* paid the money. On the whole it is by no means clear, that the agreement was prior to the judgment. Supposing it, however, to have been prior, the judgment must prevail. This agreement was kept secret for ten years, and being by parol, it can have no effect in law or equity, against a judgment creditor, who stands upon much higher ground than the defendant in the judgment. He has at least an equal equity, and having the law also with him, he must prevail against one who has only equity. 1 *Fonb.* 38. 2 *Fonb.* 147, note.

There was not even a parol agreement for the conveyance of the land; but merely an agreement that when the land was sold, *John Withers* should be paid out of the proceeds of the sale. It was at that time in every respect land, and remained so, until it was sold. *Ferree v. The Commonwealth*, 8 *Serg. & Rawle*, 312. Whatever operation this agreement might have between the parties to it, it could not affect strangers; the chancellor would pro-

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)

bably decree the execution of it as regards them, but not to the prejudice of a third person, without notice. The parol agreement, it cannot be seriously contended, (though the argument seems to go that length) has greater validity than an unrecorded mortgage, and it has been decided that an unrecorded mortgage shall not prevail against a subsequent judgment creditor. *Semple v. Burd*, 7 *Serg. & Rawle*, 286. One who advances money upon the credit of a judgment, holds the position of a mortgagee or purchaser, who is not affected, even by a parol sale of the land, when the money has been paid, and possession delivered, unless he has had notice of the sale. *Lessee of Billington v. Welsh*, 5 *Binn.* 129. 7 *Serg. & Rawle*, 64. Still less can he be affected by a prospective appropriation of the proceeds of the land, when it shall be sold.

Reply. *Michael Withers*, was a competent witness. *John* had released him, and he remained liable to *Evans's* judgment. He therefore testified against his interest; for his evidence tended to deprive the assignees of *Evans* of this money, which would have discharged the judgment. Taking the whole of his deposition together, it was clearly proved that the agreement was prior to the judgment, and if so, it must prevail. It is not denied that a *purchaser* without notice, from a trustee, shall hold the land discharged of the trust; but a judgment creditor is not a purchaser, and has never been held in *Pennsylvania*, to stand on the same ground. The case cited from 7 *Serg. & Rawle*, 286, differed from this; it was that of an unrecorded mortgage, which is declared by an act of assembly to be of no validity. *John Withers* was in effect a purchaser who had paid the whole consideration.

The opinion of the court was delivered by

DUNCAN, J. I refer to the case stated on the appeal, for the facts, and on that statement, proceed to give the opinion of the court.

The interest of *Michael Withers* in his father's lands, until it was sold by the administrators, continued real estate. It was not possible by mere words to convert it into personal property so as to affect the lien of any third person; the judgment of *Evans* assigned to *Eshelman* bound it at law.

Nothing could be more pernicious than cases of parol trust or secret understandings, and nothing could be more secret than the trust set up by appellant, for it is not only not reduced to writing, but there is no witness to prove it, except *Michael Withers* himself. There would be no safety, if these secret acts between brothers, locked up in their own breasts, relative to their father's estate, should prevail against *bona fide* judgments by strangers.

If this claim can be supported, it must be because a trust was created, for no legal estate passed; and if such a trust were to prevail, it would be repealing the act of frauds and perjuries, which enacts that no estate or interest in land shall be created by

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)
parol only, and no trust can be raised by mere words, unless where it is raised by the act and operation of law. A departure from the wholesome provisions of the clear and positive enactments of that act, of which it has been said by *English* jurists, that every line of it deserved a subsidy, has been regretted; and judges, instead of extending the exceptions, are drawing in and conforming to the statute. It must be conceded, that at law no interest in the land passed to *John Withers*. Although the seventh section of the statute of frauds, which enacts that all declarations or confessions of trust or confidence of any lands, &c., shall be manifested and proved by some writing, is not incorporated in our law, yet in substance it is comprehended in the first section of the act:—"No interest in land, either in law or equity, shall pass by parol only, any consideration for making the agreement to the contrary notwithstanding, except for a term not exceeding three years; nor except by deed or note in writing signed by the party, or by the act and operation of law." Trusts arising by act and operation of law, are where trust money has been laid out in lands, or where one man pays the money and the conveyance is to another. These, and cases falling within the same reason, are the only cases of resulting trusts by act and operation of law, which are within the exception in the act of assembly. *Wallace v. Duffield*, 2 *Serg. & Rawle*, 521. To raise a trust by act and operation of law, an actual payment by *cestui que trust* must be shown to have been made at the time of the purchase. *Stiner v. Stiner*, 5 *Johns. Ch. Rep.* 1. Cases of fraud are always exceptions between the parties to the fraud.

It is said, that these brothers had a right to enter into the agreement, that one who had advanced money for the other, should be paid out of the father's descended estate, because no other right had then interfered. So they had, but these agreements, to have a binding effect on others, must be in the mode pointed out by the law, and if they are not, they cannot bind the legal rights of others. They cannot deprive a creditor of the security he has obtained, by an agreement which the law says shall pass no interest in the land; and where the application is made to a court of chancery, that court never would grant relief to such secret trust as this, nor take a plank from a creditor. It is further said, this was a pledge. I know of no effectual pledge of land but a mortgage. Now, if this had been a mortgage, the law requires it to be published by record; thus showing that the law will not tolerate a secret pledge of land. Make the most of *John Withers'* case, the agreement was a security for indemnity, by parol, on land. The land was not in his hands further than as he was the instrument, the attorney, the officer, of the law, to make sale. The accident of his being co-heir makes no difference,—the same consequence must arise if the party was a stranger. The equity of the judgment creditor, is not only equal to that of the appellant, but it is superior: he has both the law and

(Appeal by John Withers from a decree of the Orphans' Court of Lancaster county.)
equity on his side, and must prevail. This principle is so familiar, that it would be a waste of time to cite authorities to prove it.

The object of all registering acts is to protect third persons, but not to enable the parties themselves to set it up against their own acts. In *England*, where title deeds are deposited with an agreement to mortgage, this has been treated in the light of an equitable mortgage. But it is apprehended, that one who purchases in a register county, without notice of the deposit and agreement, would be protected. He certainly would here. An unrecorded mortgage will not prevail against a subsequent judgment. It would be a matter of astonishment to find the law so inconsistent, as that a man who has obtained a formal mortgage which he neglects to record, should be postponed to a subsequent judgment; and yet that a parol agreement, known only to the contracting parties, and established only by the oath of one of them, should prevail against such judgment. If it was in writing it could not, or the registering act is a dead letter. That it should be set up as a parol agreement, and obtain because it was not reduced to writing, if when it had been reduced to writing, but not recorded, it would be void, would be an obliquity not to be found in the law.

I am opinion, that the decree of the Orphans' Court should be affirmed.

Decree affirmed.

[LANCASTER, JUNE, 3, 1826.]

BAILEY, Administratrix of BAILEY, against BAILEY, for the use of the Executors of NEILL.**IN ERROR.**

In an action on a promissory note against the administrator of the drawer, the defendant may, under the plea of payment with leave to give the special matter in evidence, prove, that as administrator he had assigned to the plaintiff the note of a third person, of greater amount than the claim of the plaintiff, and that the amount of the note thus assigned, had been paid to the plaintiff.

Where, in an action against an administrator, on a promissory note of the intestate, none of the pleas deny that the defendant has personal assets to satisfy the plaintiff's claim, the defendant cannot give in evidence, a record of the Orphans' Court, showing that on a valuation and appraisement of the real estate of the intestate, the plaintiff who was his brother, took it at the appraisement, giving security to the other heirs.

It is settled law, that the acknowledgment of a debt, subsisting at the time of the acknowledgment, is sufficient evidence from which to infer a promise to pay, and to take the case out of the act of limitations; unless it be accompanied by words or explanations inconsistent with such a promise. A letter, therefore, written by defendant, asserting that there was once a debt, that it had been paid, and explaining how it had been paid, will not take the case out of the act of limitations, even if it can be proved that the defendant was mistaken in supposing it had been satisfied in the manner alleged.

In an action on a promissory note against the administrator of the drawer, a statement filed under the act of 21st of March, 1806, setting forth a copy of the note and claiming the principal and interest due upon it, is sufficient, without averring a promise to pay by either the intestate or the defendant.

SEVERAL bills of exceptions to the opinion of the court below, both upon points of evidence, and in their charge to the jury, being returned with the record of this case on a writ of error to the District Court of the city and county of Lancaster, the questions growing out of them were argued in this court by *Jenkins* for the plaintiff in error, and by *Jacobs* and *Porter* for the defendants in error.

The opinion of the court, which fully states the points decided, and the facts connected with them, was delivered by

TILGHMAN, C. J. This action was brought by *John Bailey* (for the use of the executors of *Thomas Neill*, deceased,) against *Ann Bailey*, administratrix of *Thomas Bailey*, deceased, on a promissory note for eight hundred and sixty-four dollars and twenty-three cents, drawn by the said *Thomas Bailey*, dated the 7th of August, 1806, payable to the said *John Bailey*, four months after date. On the 19th of July, 1820, *John Bailey* assigned all his right, title, and interest to the said note, to *Robert Cathcart* and *Lewis Neill*, executors of *Thomas Neill*, deceased. The plaintiff filed a statement, setting forth a copy of the note, and claiming the principal and interest due on it. The defendant pleaded *non assumpsit*, payment with leave to give the special

(Bailey, Administratrix of Bailey, v. Bailey, for the use of the Executors of Neill.) matter in evidence, a set-off, and the act of limitations. This action was brought, in the year 1822. Several bills of exception to evidence, are placed on the record, and also exceptions to the charge of the court. These exceptions were taken by the counsel for the defendant. The first bill of exceptions is, to the opinion of the court, in permitting certain letters between *Lewis Neill*, and *Ann Bailey*, (the defendant) to be read in evidence. As the defendant's counsel said nothing in support of this exception, it is considered as relinquished.

The second bill, is to the opinion of the court, in rejecting the following evidence offered by the defendant, viz. a promissory note from *James Galbraith* and *Samuel S. Galbraith* to *Thomas Bailey*, for one thousand dollars, dated the 12th of *May*, 1805, payable twelve months after date, assigned by *John Greer* and *Samuel S. Galbraith*, administrators of *Thomas Bailey*, to *John Bailey*, the 7th of *July*, 1809, and the receipt of *John Bailey*, indorsed on the same, dated the 11th of *April*, 1810. The counsel for the defendant contended, that this was special matter, admissible in evidence, under the plea of payment with leave, &c. and I am of opinion that it ought to have been admitted.

The plaintiff *John Bailey* had a demand against the estate of his brother *Thomas Bailey*. The administrators of *Thomas Bailey* alleged that this demand was satisfied, and to prove it, they offered to show, that they, as administrators of *Thomas Bailey*, had assigned to *John Bailey*, another note to a greater amount than the claim of *John Bailey* in this suit, and that this last mentioned note had been paid to *John Bailey*. This, though not a direct payment of the note on which this action was founded, was certainly important evidence, from which satisfaction of the said note might be inferred, unless the transaction was explained by *John Bailey* in a manner which took off the force of the presumption. The least that can be said of it, is, that though not conclusive, it was pertinent evidence. There was error, therefore, in the rejection of it.

The third bill of exceptions, is to the opinion of the court, in rejecting the following evidence offered by the defendant, that is to say; a record of the Orphans' Court of *Lancaster* county, containing an inquisition upon the estate of *Thomas Bailey*, who died intestate, leaving a widow (*Ann Bailey*, the defendant,) one brother (*John* the plaintiff, in whose name this suit is brought,) five sisters all living, and a niece, the daughter of another sister deceased. The inquest made a valuation of the real estate, and found, that it could not be divided without prejudice, whereupon it was so proceeded, that the whole of the said real estate was taken by *John Bailey* at the valuation aforesaid, who gave security for payment of their respective parts, to the widow and heirs of *Thomas Bailey*. It is difficult to conceive, how this transaction can be so connected with the note on which this suit was brought, as to be

(Bailey, Administratrix of Bailey, v. Bailey, for the use of the Executors of Neill.)

evidence for the defendant. The plaintiff's demand was against the defendant, as surviving administratrix of her deceased husband *Thomas Bailey*—none of her pleas denied that she had personal assets sufficient to satisfy the plaintiff, and those assets were the proper fund from which the plaintiff's demand, if proved, was to be paid. But by some inference drawn from this record, she would now turn him round to the real estate of *Thomas Bailey* for satisfaction. This she has no right to do. He may look to her in the first instance for payment. And it is for the interest of the heirs of *Thomas Bailey*, that the defendant should be first resorted to, because she has all the papers of the deceased in her possession, and has the best means of knowing whether the plaintiff's demand has been satisfied. If *John Bailey*, after taking his brother's estate at the appraised value, had been sued by any of the heirs, for their shares of the money, and could make it appear that there were outstanding debts of *Thomas Bailey*, for which the lands were liable, I do not say that he might not have had relief, but that is quite different from the case before us. I do not see how the evidence offered by the defendant is applicable to any of the issues joined in this cause, and am therefore of opinion that it was not evidence.

Several errors assigned, and numbered two, three, and four, are reducible to one point; that is, the opinion of the court on the effect of several letters from the defendant to *Lewis Neill*, as to taking the case out of the act of limitation. Before I examine these letters, I will state what I consider as settled law, as to the effect of acknowledgment by a debtor, who has pleaded this act in bar of the plaintiff's action. The acknowledgment of a debt subsisting at the time of the acknowledgment, is sufficient evidence to infer a promise to pay, and consequently to take the case out of the act of limitations, unless such acknowledgment be accompanied with words, or explanations, inconsistent with a promise to pay the debt. This is the sum and substance of the law, laid down by this court in various cases without deviation, in proof of which I will refer to three late decisions: *Fries v. Boisselet*, 9 *Serg. & Rawle*, 128, *Hudson v. Carey*, 11 *Serg. & Rawle*, 10, and *Eckert v. Wilson*, in which the opinion of the court was delivered at Lancaster, at May Term, 1825, and is not yet reported.* I will add, that I believe, the principle held by us, is in accordance with the opinions of the Supreme Courts of the *United States*, of *New York*, and of most other states in the Union. The letters of Mrs. *Bailey* are next to be considered. Her first letter, dated the 9th of May, 1821, was in answer to one from *Lewis Neill*, dated the 7th of April, 1821, in which he gave her the first information of his claim. She tells him, "that she is much surprised at the

* See 12 *Serg. & Rawle*, 393.

(Bailey, Administratrix of Bailey, v. Bailey, for the use of the Executors of Neill.) contents of his letter, as she always understood, all demands of Mr. *John Bailey* were settled, by *Thomas Bailey's* two other administrators (*Greer and Galbraith*.) and that she thinks, a note existing in silence, so many years, is very strange." There is certainly nothing which looks like an acknowledgment of an existing debt, in this letter. Its whole scope is to the contrary. Her next letter is dated *July 10, 1821*. She there tells Mr. *Neill*, "that she is well satisfied, there was a final settlement between her husband and his brother *John Bailey*, not more than a month before his death, when her husband gave his note to his brother, for the balance due to him, and that sometime after her husband's death, the two administrators, Mr. *Greer* and her brother *Samuel Galbraith*, gave *John Bailey* an assignment of a note as payment of his note against his brother's estate, the amount of which assigned note he received and receipted for, in *April, 1810*, (one thousand two hundred and ninety-six dollars) which note she holds, with his receipt in full." In a subsequent part of the letter she says, "I never took an active part in settling the estate, nor was there ever any thing in my hands to pay with, nor would I think myself justifiable, in paying accounts twice I do not wish to deceive you, Mr. *Neill*; I consider his note paid." Now surely this whole letter is inconsistent with a promise to pay. The writer asserts, that though there was once a debt, it had been paid, and tells how it was paid. This is in direct contradiction either of an existing debt, or a promise to pay it. The plaintiff's counsel has indeed attempted a distinction, by which he would take this case out of the principle so often recognised by this court. He says, that the defendant having acknowledged that the debt once existed, and mentioned the manner in which it was satisfied, it must be presumed, that she promised to pay, if it could be proved that she was mistaken in her supposition that it was satisfied in the way she alleged. I do not feel the force of this distinction. The question is, was there any thing in the letter, inconsistent with a promise to pay? And I must confess, that to me, the whole letter, from beginning to end, is irreconcilable with a promise by Mrs. *Bailey* to pay. The next letter, dated *July 16, 1821*, contains nothing which is material, and in the last, dated *August 2, 1821*, Mrs. *Bailey* tells Mr. *Neill* flatly, that she considers her husband's note as paid, and therefore leaves him to act as he thinks proper. In the whole of this correspondence, I can perceive nothing like an acknowledgement of an existing debt, nothing from which a new promise by Mrs. *Bailey* can be inferred. I am of opinion, therefore, that there was error in the charge of the District Court, that these letters took the case out of the act of limitation.

The errors numbered five and six, shall be considered together, as they both relate to the plaintiff's statement. The defendant excepted to this statement, because it did not aver that any pro-

(Bailey, Administratrix of Bailey, v. Bailey, for the use of the Executors of Neill.)

mise was made by the defendant; and the evidence on which the plaintiff relied for the support of his action, was a promise inferred from the letter of Mrs. *Bailey*. If, instead of a statement, the plaintiff had filed a declaration, it is true, that unless there had been a count, laying a promise by the defendant, no evidence of her promise could be received. But a statement is widely different from a declaration, and we must look to the act of assembly for information on that subject. A statement is the creature of the act of 21st of *March*, 1806, the object of which was, to dispense with form so that every man might be his own lawyer. It is enacted in the fifth section of this law, that it shall be the duty of the plaintiff to file in the office of the prothonotary "a statement of his demand, particularly specifying the date of the promise, book-account, note, bond, penal or single bill, or all or any of them, on which the demand is founded, and the whole amount which he believes is justly due to him from the defendant." Now all this has been done in the present instance. Not only were the particulars of the date of the note, the amount claimed, &c. specified, but a copy of the note was subjoined, and the defendant was informed, that the demand was against her, as surviving administratrix of *Thomas Bailey*. There was no necessity for laying an assumption either by the intestate or the defendant; but it was incumbent on the plaintiff to *prove* every thing that was necessary for his recovery on the note described in the statement, and the defendant having pleaded the act of limitation, it was also incumbent on the plaintiff to prove every thing necessary to take his case out of the act. The intent of the act of assembly was complied with, and the parties went to trial with sufficient notice of the matter in issue. The defendant knew, or ought to have known, that a promise by herself would take her case out of the act of limitation, and therefore, there was no surprise on her, by evidence of such promise, given by the plaintiff. There was one more error (number seven,) assigned by the defendant, viz. that the verdict and judgment, were part in *debt*, and part in *damages*, whereas the statement was altogether in *debt*. This error has been abandoned, and therefore is not before the court.

I am of opinion, on the whole, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, JUNE, 3, 1826.]

SWEIGART *against* LOWMARTER, Administrator of
REISINGER.

IN ERROR.

After a judgment *quod computet*, in account render, entered by confession, upon a declaration averring that the defendant was the plaintiff's bailiff and receiver during a certain specified period, the plaintiff cannot amend his declaration by laying a different period.

Nor can the plaintiff, on the trial of the issues certified by the auditors, give evidence of the receipt of money by the defendant, prior to the time laid in the declaration.

A printed advertisement is not admissible in evidence, where it appears from the testimony of a witness, that the original manuscript from which it was copied was given to him, and that he had left it with the printer of a newspaper, by whom it was published; that he had not inquired for it of the printer, and had made no particular search for it among his papers, but that he believed it to be lost.

THIS suit was commenced in the Court of Common Pleas of York county, by the plaintiff in error, *John Sweigart*, against the defendant in error, *Jacob Lowmarter*, administrator of *Henry Reisinger*, deceased, according to the record returned on a writ of error to the court below, "by summons in debt by assumpsit, not exceeding two thousand five hundred dollars." The plaintiff filed a declaration in account render which contained four counts.

The *first* count stated, that *Sweigart* and *Reisinger* owned a stud horse called *Bold Lion*, which was to be kept by *Reisinger*, and was under his care as bailiff, and that he was to render a reasonable account for the five years he kept him, to wit, from the 2d of *September*, 1809, to the 2d of *September*, 1814, to the said *Sweigart*, and that during that period he received for the services of the said horse, two thousand dollars.

The *second* count averred, that *Reisinger* sold the said horse for seven hundred dollars, and promised on the 1st of *November*, 1809, to render to the said *Sweigart*, a reasonable account.

The *third* count stated, that the plaintiff and defendant were owners of a stud horse named *Fancy Conqueror*, for the price of which *Sweigart* advanced one hundred and seventy-five dollars more than *Reisinger*, which horse was to be kept, and was kept by *Reisinger*, four years, to wit, from the 1st of *September*, 1810, until the 1st of *September*, 1814, to cover mares, and the said *Reisinger*, was to receive the monies and to render a reasonable account to *Sweigart*, and that *Reisinger* received one thousand eight hundred dollars and did not account for it, though he promised to do so on the 1st of *November*, 1809.

The *fourth* count set forth, that on 1st of *September*, 1809, *Sweigart* owned a stud horse called *Northampton Ball*, which he

(Sweigart v. Lowmarter, Administrator of Reisinger.)

placed under the care of *Reisinger*, from that day to the 1st of *September*, 1812, to cover mares; the said *Reisinger*, to receive the money, and render a reasonable account to *Sweigart*, after deducting a reasonable allowance for his trouble, and the maintenance of the horse, of one-third the nett proceeds; that *Reisinger* received during the said time one thousand four hundred dollars, but did not account.

The defendant pleaded, fully accounted; to which the plaintiff replied, that neither *Reisinger* nor his administrator did account.

On the 30th of *July*, 1816, a judgment *quod computet* was entered by confession. Auditors were then appointed who certified certain issues; but what they were, could not be discovered from the record.

On the trial of these issues the plaintiff offered to prove, that the agreement between himself and the defendant's intestate respecting the three stud horses, and the time they were respectively kept by the defendant, viz. three, four, and five years, preceded the 1st of *November*, 1809. The evidence was objected to by the defendant, rejected by the court, and an exception taken.

The plaintiff offered to prove, that *Bold Lion* was held and used by *Henry Reisinger*, as a stud, from the 1st of *March*, 1805, to the 1st of *March*, 1810, for which he was bound to render a reasonable account. This evidence was likewise overruled and an exception taken to the opinion of the court.

The plaintiff moved the court for leave to alter the declaration, so as to make it read, from 1st of *March*, 1805, to the 2d *September*, 1809. This amendment being objected to, the court refused it and sealed another bill of exceptions.

The defendant, having proved by a person who lived with *Reisinger* in the years 1807, 1808, 1809 and 1810, that the horse *Bold Lion*, was of no value as a stud, and that he afterwards sold him to *George Wolf*; the plaintiff, after proving that *Wolf*, in 1810, took the horse to *Shepherdstown, Virginia*, where, and at *Sharpsburg, Maryland*, about three miles distant, he stood for the season, and had a large number of mares, proved by *Wolf*, that he, *Wolf*, had received a written communication, with respect to the horse, from *Reisinger*, from which a printed advertisement, which was produced, was copied; that he did not know whether the original was with the printer, or whether it was among his papers at home, or what had become of it, he believed it was lost; that he looked in his book from which he got the advertisement and could not find it; that he looked no where else and did not inquire of the printer; that he lived in *Martinsburg*, and left some of his papers respecting the horse in *Sharpsburg*, with a man who collected money for him. The plaintiff then offered in evidence the advertisement by *Wolf* of *Bold Lion*, for the season, with the certificate of *Reisinger*, and others in his favour. The evidence was objected to

(Sweigart v. Lowmarter, Administrator of Reisinger.)

by the defendant's counsel, and rejected by the court, to whose opinion an exception was again taken.

After argument by *Gardiner* and *Hopkins*, for the plaintiff in error, and *Wadsworth* for the defendant in error, the opinion of the court was delivered by

GIBSON, J. This record is a tissue of extravagant blunders, and many errors might have been assigned, that would be fatal to the judgment. The action was originally debt under the act of assembly on a promise to account for monies received as bailiff; and the declaration was filed in account render, without any agreement appearing of record to cure this monstrous incongruity. Judgment *quod computet* was rendered by confession, and auditors were assigned, by whom certain issues taken by the parties were so imperfectly certified, that it is difficult to say what they are. The plaintiff had averred in his declaration that the defendant was his bailiff and receiver during a period between particular days, which were specified; and at the trial of the issues, finding that his proof did not correspond with this, moved to amend by laying a period altogether different. Amendments at common law, being matter of discretion, are not the subject of error; but amendments under the act of assembly, being in certain cases matter of right, are inquirable of here. By the very words of the act, these are allowable only, "on or before, the trial of the cause,"—never after it. But within the intent of the act, the trial of the cause in account render, is the trial of the issue on the plea to the declaration, and not the trial of issues that may happen to be certified by auditors. Here the plaintiff thought proper to render the time material by assigning a particular duration to the period during which the defendant was his receiver; consequently, when the defendant confessed judgment, he acknowledged that he was liable to account for monies received during that period, and no other. How then could the court, without his assent, change the period for which he admitted himself to be accountable? To alter the declaration would have been to alter the judgment and to change the terms on which it had been confessed. Suppose instead of confessing judgment, the defendant had pleaded to issue, and it had been found against him, only the facts alleged in the declaration would have been found; and to have inserted a new averment, would have made the jury say more than they meant. But it is impossible to raise a difference in this respect between a judgment rendered on a verdict and a judgment rendered on a confession of the party. In either case the amendment goes to substance and not to form, and is consequently not within the act of assembly. At this stage of the proceedings, matter of form may possibly be amendable at the common law; but matter of substance certainly is not.

The plaintiff offered evidence of monies having been received, before the time laid in the declaration: and as the time was made material, this evidence was properly rejected. And besides, the

(Sweigart v. Lowmarter, Administrator of Reisinger.)

parties had not a right to go into the whole of the account, the jury being sworn to try only the issues that had been certified by the auditors. What these issues were does not appear by the record; but the auditors themselves were precluded from meddling with any transactions but those comprised within the period specified, and consequently could certify no issue of fact which arose out of any thing else.

The defendant having been improperly permitted to prove that one of these horses was entirely worthless for the purpose for which he was used, the plaintiff offered in evidence the copy of an advertisement in which excellent qualities were attributed to it; the original of which had been furnished to one *Wolf*, who after the period in question, had purchased the horse of *Reisinger*. The original paper had been given to *Wolf* in manuscript, and had been left by him with the printer of a newspaper, in *Martinsburg, Virginia*, by whom it had been published. *Wolf* testified that he had not inquired of the printer, and had made no particular search for it even among his own papers, but expressed an opinion that it was lost. It is impossible to doubt the correctness of the opinion of the court, that evidence had not been given of due diligence to procure the original, or to account for the want of it. The probability that it had not been preserved by the printer, can furnish no reason why inquiry should not have been made of him; it might have proved successful, and that alone is reason enough why it ought not to have been omitted. But if the sufficiency of preliminary evidence such as this, be a legitimate subject for the consideration of a court of error, still the opinion of the court below, who are to judge of the credibility of witnesses, (of which we can know little here) must necessarily be decisive in all but cases of palpable mistake *in matter of law*: of mistake in judging of the weight of evidence, we certainly cannot take cognizance, and should oftener than the court below fall into error, were we to attempt it. With respect to the point before us, we are of opinion, that there was no error, either in fact or in law, and that the evidence was properly excluded.

Judgment affirmed.

[LANCASTER, JUNE, 3, 1826.]

Case of a Road from HERR'S Mill, Conestogo, to the Columbia Turnpike Road.

CERTIORARI.

The Court of Quarter Sessions has no right to make a material alteration in the report of viewers of a road, because it appears that the surveyor has not pursued the directions of the viewers.

ON a *certiorari* to the Court of Quarter Sessions of Lancaster county, it appeared that at the April Sessions, 1823, viewers were appointed, who reported in favour of a road, the courses of which they set out. A review was afterwards awarded and the reviewers reported that the road laid out by the viewers, "would be useless, burdensome and inconvenient, to the inhabitants of the township through which it passes." To this report exceptions were filed, which did not appear to have been decided upon, and afterwards a petition was presented for a re-review, which was withdrawn by leave of court.

Upon the order for the original view, an endorsement, without date, in the following words was made: "It appearing that an error has been committed by the surveyor in running two courses, to wit: north 16° 10' 78 p. and north 31°, west 112 p. instead of one course north 25½°, west 189", as he was directed to run it by the viewers, the court order that the drafts be altered so as to conform to the directions of the viewers; and with this correction, confirm the report of the viewers and order the road to be laid out of the width of thirty-three feet.

In this court several exceptions to these proceedings were taken, which were argued by *Buchanan* in support of the exceptions, and by *W Hopkins* against them.

PER CURIAM. The principal objection to the proceedings in this case was, that after the report of the viewers was returned, the Court of Quarter Sessions made an order that a material alteration should be made in the road, because it appeared to them, that the surveyor had not pursued the directions of the viewers, and that alteration being made, the road was confirmed.

It is the opinion of this court, that the Court of Quarter Sessions had no power to make the alteration, but should have returned the report to the viewers, in order that they might correct it. The report is the act of the viewers, which the court may either reject, or confirm; but they cannot alter it, for then it is no longer the act of the viewers. It does not appear, that the viewers came into court, and requested that an error might be corrected, or that they had any notice of, or assented to the proposed alteration of their report. It is our opinion therefore, that the proceedings should be quashed.

Proceedings quashed.

[LANCASTER, JUNE, 3, 1826.]

SHANK *against* WARFEL, Administrator of LINGEFELTER.

IN ERROR.

A motion to dismiss an appeal from the judgment of a justice of the peace, on account of a defect in the recognizance of bail, must be made within a reasonable time; and if it be delayed nearly two years, it is to be presumed that the appellee waives all exceptions to the recognizance.

On a writ of error to *Lancaster* county the case was thus:

The defendant in error, *Jacob Warfel*, administrator of *Daniel Lingefelter*, brought a suit against *Rudolph Shank*, before *John Good*, Esq. a justice of the peace, who gave judgment in favour of the plaintiff for eighty-one dollars forty cents. The defendant entered an appeal to the Court of Common Pleas, to *August* term, 1821, having previously entered into a recognizance before the magistrate, in the following terms:

“*Rudolph Shank*, the principal, brings *Daniel Hess* as bail, to be conditioned for the defendant's appearance, in a sum of one hundred and sixty-two dollars and eighty cents, and the costs of suit, to be levied of their goods and chattels, if not complied with according to law.”

On the 10th of *May*, 1823, the court, on motion of the plaintiff's counsel, granted a rule to show cause why the appeal should not be stricken off, and after argument, considering that the recognizance was not in the form prescribed by the act of assembly, and that the plaintiff had done nothing to waive the irregularity, they made the rule absolute and dismissed the appeal. This was now assigned for error.

Wright, for the plaintiff in error, observed, that admitting the recognizance to be defective, the appellee had waived the irregularity by permitting the cause to rest nearly two years in the Common Pleas before he moved to strike off the appeal. He relied on the case of *Cochran v. Parker*, 6 *Serg & Rawle*, 549, in which a delay for a much shorter time was held to be a waiver of a defect in a recognizance on an appeal from a justice.

Buchanan, for the defendant in error, answered that the case of *Cochran v. Parker*, was distinguishable from this. There the recognizance was amended by the justice, and the appellee had acquiesced in the amendment. But here there was in fact no recognizance. It was bad from the beginning, and had never been amended. The motion to strike off the appeal, was made before any act was done, or expenses incurred.

PER CURIAM. This action was brought by the defendant in error, against the plaintiff in error, before a justice of the peace,

(Shank v. Warfel, Administrator of Lingefelter.)

who gave judgment for the plaintiff *Rudolph Shank*, (the defendant below,) appealed to the Court of Common Pleas, who dismissed the appeal, because the recognizance of bail was not in conformity to the act of assembly.

It appears that the appeal was entered to *August* term, 1821. The motion for a rule to show cause why the appeal should not be dismissed, was not made by the counsel for the plaintiff until the 10th of *May*, 1823, and on the 18th *September*, 1823, after argument, the appeal was dismissed.

We have examined the recognizance, and are of opinion that it is bad. The plaintiff cannot recover upon it,—because it is quite different from that which is prescribed by the act of assembly. But the plaintiff suffered the appeal to remain too long in the Court of Common Pleas, before he objected to the recognizance. It was nearly two years before he moved in the business. A motion to dismiss an appeal, on account of a defective recognizance, is somewhat in nature of a plea of abatement, and should be made in reasonable time, otherwise it is to be presumed that the appellee waives all exceptions to the recognizance. It is the opinion of the court, that the delay in this case was unreasonable, and therefore the appeal ought not to have been dismissed. The judgment is to be reversed, and the record remitted, with an order to the Court of Common Pleas to reinstate the appeal, and proceed in the cause.

Judgment reversed, &c.

[LANCASTER, JUNE 3, 1826.]

STUBBS, Administrator of PYLE, *against* KING.

IN ERROR.

35R25
In an action on a bond, given for the purchase money of a tract of land, the defendant may, under the plea of payment and notice of special matter, prove that while he was treating for the purchase, the plaintiff showed him, as the boundaries, lines which were afterwards found not to be the boundaries of the land conveyed, and that the lines designated in the conveyance excluded the land which was shown to him as part of the tract.

WRIT of error to *Lancaster* county.

In the court below this was an action of debt on a bond, conditioned for the payment of one hundred pounds on the 3d of *May*, 1812, given by *Samuel King*, the defendant in error and defendant below, to *Amos Pyle*, the intestate of the plaintiff in error.

The plaintiff below filed a statement, under the act of the 21st of *March*, 1806, and the defendant, having pleaded payment with leave to give the special matter in evidence, gave notice that on the trial he should give in evidence, “that the bond on which the suit was brought, was given for the purchase money of a tract of land,

(Stubbs, Administrator of Pyle, v. King.)

sold by *Amos Pyle*, the plaintiff's intestate, in his lifetime, to the defendant, *Samuel King*, and that in the sale thereof the said *Amos Pyle* practised fraud, imposition, and misrepresentation on the defendant, in showing the lines or boundaries of the said tract of land, and showed him, at the time he went to view the premises with an intention to purchase the same, different lines from those for which his deeds called, whereby he led the defendant to believe, that he was to convey to him certain timber land, which was included within the lines so shown, and which was the best land on the premises, but which the said *Amos Pyle* did not afterwards convey, and that the tract of land so sold did not contain the quantity which the said *Amos Pyle* represented it to the defendant to contain."

The defendant, after having given in evidence a deed dated the 13th of *April*, 1807, from *Amos Pyle* to *Samuel King*, offered in evidence a deed, bearing date the 15th of *April*, 1796, from the executors of *William Gilchrist*, deceased, to the said *Amos Pyle*. The counsel for the plaintiff objected to the testimony, but the court admitted it, and an exception was taken to their opinion.

The defendant then offered to prove, by *John Kurtz*, "that at the time *Samuel King* was about purchasing the tract of land, he went with him to *Amos Pyle's*; that after talking about the purchase, *Samuel King* requested *Pyle* to show him the lines of the tract; that *King*, *Pyle*, and the witness went out on the farm, and *Pyle* took them to the black oak corner between him and *Reynold's*, which was regularly marked on four sides, and told *King* that was his corner, and if he sold to him he sold to that; that *Pyle* took them along the line running from thence to the white oak, and showed them several marked trees, upon the line, which he said were the line trees of his place; that the land along the line was very good timber land, the best upon the place; that the whole of the timber land upon the place was about fifteen or twenty acres, and that this, shown as belonging to the place, was the best of it, one acre of it being worth three acres of the cleared land, taken in connexion with the farm; and that the time at which *Pyle* showed the line to *King* was at or about the time the article of agreement was executed, to wit, the 3d of *January*, 1807." This evidence being objected to by the plaintiff's counsel and admitted by the court, a second bill of exceptions was tendered and sealed.

Montgomery and Jenkins, for the plaintiff in error, referred to 1 Binn. 616. *Lessee of Dinkle v. Marshall*, 3 Binn. 587. *Snyder v. Snyder*, 6 Binn. 483. *Christ v. Diffenbach*, 1 Serg. & Rawle, 464. *Cozens v. Stevenson*, 5 Serg. & Rawle, 421. 5 Johns. Ch. Rep. 29.

Slaymaker and Hopkins, for the defendant in error, cited, *Pyle v. King*, 8 Serg. & Rawle, 166. 1 Serg. & Rawle, 441. 1 Madd. Ch. 262. *Long v. Fletcher*, 2 Eq. Ab. 5. 1 Fonb. 122, 124, (note z.) 6 Binn. 482.

(Stubbs, Administrator of Pyle, v. King.)

The opinion of the court was delivered by

GIBSON, J. The consideration of the bond on which this suit is brought, is the price of a tract of land. At the trial, the defendant was permitted to prove that while he was treating for the purchase, the plaintiff showed him, as the boundary, lines which are since found not to be so in fact, and that the lines designated in the conveyance, exclude land which was shown to him as a part of the tract. In *England* such a plea would not be tolerated in a court of law, notwithstanding that in Mr. *Chitty's* treatise on pleading, (vol. 2, page 495,) there is a precedent for it; but the better opinion is, that only that sort of fraud which is committed in the execution of the instrument, can be pleaded at law. In *Pennsylvania*, where equity is a part of the law, this distinction is without consequences, fraud being a defence in all cases. But the objection is rested on ground which is independent of the forum. In the conveyance to the defendant, the land is described by metes and bounds; and it is argued, that the evidence contradicted the deed, by showing that the land was sold by other boundaries: and it is also contended, that the declarations of the grantor, having been made *before* the execution of the deed, were inadmissible, all former stipulations being merged in the act, which is the consummation of the contract. The objection on the score of the statute of frauds merits but a passing remark. The evidence respected not the construction of the conveyance, nor any question as to what passed by its terms, but a matter entirely extrinsic, and it therefore was not in contradiction of the deed. The object was not to make out or disclaim title to land by parol, but to show that the defendant had been overreached in the bargain, such as it appeared on the face of the conveyance: and the evidence was therefore consistent with the conveyance. These declarations by the grantor at any time previous to the execution of the conveyance, are competent evidence to affect not the vendee, but the vendor himself, by showing fraud in the very concoction of the bargain. It is in general true, that the execution of a conveyance is a fulfillment of all previous *bona fide* stipulations, because such stipulations are liable to be varied while the negotiation is pending, and the material thing being the definitive conclusion at which the minds of both parties have arrived, the writing by which the evidence of it is to be perpetuated, is supposed to contain the whole contract. But where a continued misapprehension of material facts has been induced on the part of the one, by the misrepresentations of the other, it is obvious that the execution of the writing ought not to extinguish the right of the injured party to show the fraud by which his assent to the contract was obtained. This is a particular head of equitable relief; in affording which, it is said a deed cannot be set aside in part for fraud; but that it must be set aside *in toto*, even though innocent persons are interested under it. But this, I apprehend, must be understood in relation

(Stubbs, Administrator of Pyle, v. King.)

to fraud which goes to the whole contract, and where the injured party is entitled to rescind. In cases like the present, it seems to be our practice to consider the defence as resting on the ground rather of want of consideration as a consequence of the fraud; and the relief is then only commensurate with the actual want of consideration. We are of opinion the evidence, contained in these two bills of exceptions, which in principle are essentially the same, was properly admitted.

Judgment affirmed.

[LANCASTER, JUNE 3, 1826.]

HISA and another, Administrators of LUCAS, *against* LUCAS.

IN ERROR.

D. L. being indebted on bond to the estate of his deceased father, *A. L.*, in order to pay that and other debts, entered into an agreement with the administrators of *A. L.*, by which it was stipulated, that he should sell to them the plantation on which he lived, together with the stock, and that they should sell the same to the best advantage, and apply the proceeds in the first place to the payment of the other debts of *D. L.*, and the residue, if any, to the extinguishment of his bond, "and if the plantation and stock brought more than settled the debts, including the bond, return the overplus to him; but if not enough, the administrators were to be satisfied with what the property brought, and not call on *D. L.* for any more thereafter." Held, that the sale of the plantation and stock, and the proceeds arising from them, were an extinguishment of the bond.

ERROR to the Common Pleas of York county.

Daniel Lucas, the defendant in error, brought this suit in the court below against *George Hisa* and *Peter Klinefelter*, administrators of *Adam Lucas*, deceased, to recover a distributive share of the estate of his father, the defendants' intestate. With the record was returned a case stated for the opinion of the court, to be considered as a special verdict. It was, in substance, as follows:

Daniel Lucas, the plaintiff below, was indebted to his father, the intestate, at the time of his decease, in the sum of two thousand and one dollars and forty-seven cents, on a bond. On the 25th of January, 182^o, he and the defendants, the administrators of *Adam Lucas*, executed an instrument under seal, by which the former agreed to sell to the latter his plantation and stock, in consideration of which they agreed to sell the property to the best advantage, as soon as was convenient, and first to pay all the debts which *Daniel Lucas* owed at that time, exclusive of that due to his father's estate. The residue was to go in satisfaction of the debt due to the estate of his father. If the property brought more than was sufficient for that purpose, the surplus was to be returned to *Daniel Lucas*. If the plantation and stock did not bring enough to pay the debt due to his father's estate, after all his other debts were paid, the administrators were "to be satisfied with what it

(Hisa and another, Administrators of Lucas, v. Lucas.)

brought, and not to call on *Lucas* for any more thereafter." By virtue of this agreement, the administrators disposed of the plantation and stock therein mentioned, and after paying the other debts of *Daniel Lucas* and the expenses of the sale, there remained of the proceeds of sale in their hands, eleven hundred and ninety-one dollars to be applied to the payment of the bond, leaving a difference between the amount due upon the bond and the money actually received, of eight hundred and nine dollars and eighty-six cents, for which latter sum they obtained credit in their administration account. This sum of eight hundred and nine dollars and eighty-six cents exceeded the distributive share of the plaintiff in his father's estate. On the 22d of *February*, 1823, an agreement was entered into between the said *Daniel Lucas* and the widow and heirs of the intestate, which, after reciting that there was a dispute about the bond in which *Daniel Lucas* was indebted to the estate of his father, stipulated that the debt should be settled at two thousand and one dollars and forty-seven cents, and that full possession of the plantation should be delivered to the administrators of *Adam Lucas*, on the first of the following *April*. Certain articles of furniture, implements of husbandry, &c. were reserved to the said *Daniel Lucas*, and all the rest of the utensils, and other property on the plantation, the administrators were authorized to sell, and generally to carry into effect the agreement of the 25th of *January*, 1823, to which this was declared to be a supplement. The defendants, on the same day, signed an agreement "to give up to *Daniel Lucas*, the bond upon the first of *June* next, as he had settled the bond he owed the estate, at the sum of two thousand and one dollars and forty-seven cents, according to the agreement made this 22d day of *February*, 1823, with the heirs of the said estate, and the agreement made the 25th of *January*, last past."

If, upon the preceding facts, the court should be of opinion that the law was with the plaintiff (below) then judgment to be entered for him for one hundred and fifty-three dollars and seventy-one cents, with interest from the 1st of *August*, 1822; otherwise for the defendants, in which case the costs were to be paid out of the estate.

Barnitz, for the plaintiffs in error.

Lewis, for the defendant in error.

The opinion of the court was delivered by

ROGERS, J. The question which arises in this case, is on the true construction of several agreements, referred to in the special verdict. By the first agreement, dated the 25th of *January*, 1823, between *Daniel Lucas*, and *George Hisa* and *Peter Klinefelter*, administrators of *Adam Lucas*, it appears that *Daniel Lucas* was indebted to the estate of his father in a large sum of money, and for the purpose of paying that, and other debts, he sold the plan-

(Hisa and another, Administrators of Lucas, v. Lucas.)

tation on which he lived, and his stock to the administrators. Under the article it was the duty of the administrators to sell the plantation and stock to the best advantage, and apply the proceeds, in the first place, to the payment of the other debts of *Daniel Lucas*, and the residue, if any, to the extinguishment of his bond. If the plantation and stock brought more than settled the debts, including his bond, the overplus was to be returned to *Lucas*. If they did not bring enough to pay the debt owing to the estate of his father, they were to be satisfied with what they brought, and were not to call on *Lucas* for any more hereafter. From a view of the whole article, although not very explicit in its terms, it seems to have been the intent of the parties, that the sale of the plantation and stock, and the proceeds arising from them, should be a payment or extinguishment of the bond, owing by *Daniel Lucas* to the estate of his father. After this agreement, no suit could have been sustained by them on the bond. A court of justice would have said that the bond was paid. What motives operated upon the parties, to induce them to enter into this agreement, is not disclosed. We have no means of ascertaining them, and must determine this case upon the facts set forth in the special verdict. It appears that there was very early some misunderstanding about the meaning of this article; for the agreement of the 22d of *February*, 1823, says, "that whereas there is a dispute of and about a bond, that is concerning the said estate, it is agreed that the said bond may be settled at two thousand and one dollars and forty-seven cents." This article provides when *Daniel* is to give possession of his place to *Hisa*, and *Klinefelter*, viz. on the 1st of *April*, and gives him liberty to keep certain articles of personal property therein enumerated, and says that this is to be a supplement of an article dated the 25th of *January* last, between *Daniel* and the administrators, and that the administrators are to perform all the said agreement mentions. This article is signed by the widow and heirs of *Adam Lucas*, and is an express recognition of the agreement of the administrators, and goes far to show that the sale of the plantation and stock was in payment of *Daniel Lucas's* bond. This matter, I apprehend, is put beyond all doubt by the agreement made on the same day, and signed by the administrators; in which they expressly promise to give up the bond on the 1st of *June*, as he has settled the bond he owed the estate for the sum of two thousand and one dollars and forty-seven cents, according to the agreement made the 22d of *February*, 1823, with the widow and heirs, and the agreement made the 25th of *January* with the administrators.

It has been contended, that the meaning of the agreement was, that the administrators were not to pay *Daniel Lucas* any thing on account of his share of his father's estate, until the debt due to his father's estate was paid. I have looked in vain for something in the agreement to warrant this construction. This appears to

(Hisa and another, Administrators of Lucas, v. Lucas.)

have been a family arrangement, by which it was stipulated that upon *Daniel Lucas* giving up all his property, to be applied to the payment of his debts, he should be discharged from the bond to his father, and should be let in for his distributive share of his father's estate. If it was intended that *Daniel Lucas* should be excluded from his share, it ought to have made part of the agreement, and should have been expressly inserted. I do not feel myself at liberty to supply this omission, and am therefore of opinion, that the judgment should be entered in favour of the plaintiff below for one hundred and fifty-three dollars and seventy-one cents, with interest from the 1st of *August*, 1822.

[LANCASTER, JUNE 3, 1826.]

WORMAN and another, for the use of SHEEPSHANKS,
against BOYER.

IN ERROR.

After the plaintiff has given in evidence his book of original entries, and a letter from the defendant, acknowledging the receipt of several letters from the plaintiff, but without mentioning their contents, stating his inability to pay the balance due to the plaintiff, and asking further time, the plaintiff cannot give in evidence his journal and ledger, to show what was the balance due.

A receipt, signed in the name of the plaintiffs, by a brother-in-law of one of them, who lived near them, was often in their store, and in habits of intimacy with them, is not admissible in evidence.

If a notice to produce papers be not complied with, copies of the papers may be read, or their contents proved; but the court has no power to require their production under the act of the 27th of *February*, 1798.

On a writ of error to the Court of Common Pleas of *Berks* county, it appeared that this was an action on the case in *assumpsit*, brought by the plaintiffs in error, *Samuel Worman* and *Jacob Beiterman*, for the use of *William Sheepshanks*, against *Jacob K. Boyer*. The declaration contained two counts: the first for goods sold and delivered; the second on an account stated. The cause was tried on the plea of *non assumpsit*.

On the trial, three bills of exceptions to evidence were taken, which were returned with the record. They were argued by *Hayes* for the plaintiffs in error, and by *Baird* for the defendant in error; after which, the opinion of the court was delivered by

HUSTON, J. On the trial of this cause, the plaintiffs proved and gave in evidence their book of original entries. After this the plaintiffs produced, and, having proved it to be the defendant's writing, read a letter from *Jacob K. Boyer* to the plaintiffs, dated the 17th of *March*, 1817. In this letter he acknowledges the receipt of two letters from the plaintiffs and one from Mr. *Sheep-*

(Worman and another, for the use of Sheepshanks, v. Boyer.)

shanks, states his inability to pay the balance due them, and asks time. The plaintiffs then offered to read their journal and ledger. These were objected to, and rejected by the court, and exception taken. These books must have been offered to prove something not in the day book, or they were unnecessary. It is conceded such was the case; that they contained entries of cash; but it was argued, that the plaintiffs could read them, because the defendant, in his letter above stated, mentioned *the balance*. The Court of Common Pleas was right in rejecting these books. The plaintiffs had not the two letters referred to in *Boyer's* letter of the 17th of *March*, 1817. They had given him notice to produce them, but they were not produced. They might then have read copies of them or proved their contents; but there was no evidence that those letters stated the amount of balance claimed to be due, nor that, if they stated a balance, it was the same as shown by the journal and ledger. They were properly rejected.

The defendant then proved, that *S. Ludwig* was a brother-in-law of one of the plaintiffs, lived in *Philadelphia* near them, was often in their store, and in habits of intimacy with them, and then offered a receipt as follows:

“Received, *January* 18, 1817, of Mr. *Jacob K. Boyer*, eighty-six dollars on account with *Worman* and *Beiterman*.

“*Samuel Ludwig*.”

The plaintiffs' counsel objected to this paper being given in evidence, but the court received it, and it was read to the jury; and this was the subject of the second bill of exceptions.

Neither an acquaintance, nor a brother-in-law, who is not also a clerk or agent of the party, can bind him by a receipt. Whoever pays money to such person, does it at his own risk. This was error in the court below,—indeed the defendant's counsel did not attempt to support it.

The plaintiffs then having proved notice on the defendant to produce the letters referred to in his letter above-mentioned of the 17th of *March*, 1817, moved the court below to require the defendant to produce those letters. The court refused to do so, and this was the third bill of exceptions. On a notice to produce papers which are not produced in consequence thereof, copies of the papers may be read, or the contents proved. We have an act of assembly of the 27th of *February*, 1798, 3 Sm. L. 303, which gives the courts “power in any action depending before them, on motion and on good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue,” &c. Now the plaintiffs had not complied with this act. If they had made the necessary affidavit, obtained a rule to show cause, and, on hearing, obtained an order of the court, and served it duly on the defendant, the court would have had authority to require

(Worman and another, for the use of Sheepshanks, v. Boyer.)

the defendant to produce the papers, or to satisfy the court why it was not in his power so to do; or, if the party was defendant, to give judgment by default, as far as relates to such part of the plaintiff's demand, to which the books or papers are alleged to apply. Unless the party wishing for papers takes his direction from this act, and complies with what it prescribes, he is not entitled to the benefit of its provisions. The Court of Common Pleas were right in their direction on this point. But for the error in the second bill of exceptions, the judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, JUNE 7, 1826.]

MARTIN *against* MATHIOT.

IN ERROR.

P.F.S. 488
PSR 463
On a sale of chattels, if the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such agreement, as respects creditors and the sheriff, is fraudulent; and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession, or not.

ERROR to the Court of Common Pleas of Lancaster county.

In the court below it was an action of trespass, brought by *David Martin*, the plaintiff in error, against *John Mathiot*, late sheriff of Lancaster county, for seizing four wagon horses with the harness appurtenant to them. The defendant justified the seizure under a writ of *fi. fa.* directed to him as sheriff, whereby he was commanded to levy a certain debt, for which judgment had been obtained by *Robert Croser* against *John Michael*, on the goods and chattels of the said *Michael*. The plaintiff replied, that the horses and harness were his property, and not the property of *John Michael*, and on that issue the parties went to trial. It was proved, that the horses and harness were, at the time of the levy, and for some time before, in the possession of *John Michael*, who was a wagonner. Before they came into his possession, they were the property of the plaintiff. The defendant gave evidence, that *Michael* stood charged in the books of the plaintiff, with a debt amounting to upwards of sixty dollars, and that the plaintiff, being asked, whether *Michael* was the owner of the team he was driving, answered, that it belonged to *Michael* provided he would pay him that debt. Several questions were proposed to the court on this evidence, which may be comprised within a small compass. The opinion of the court was, that if vendor and vendee agree, that the possession shall pass to the vendee, but the

(Martin v. Mathiot.)

property remain in the vendor, until the whole purchase money is paid, such agreement as respects creditors, and the sheriff is fraudulent; and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession, or not.

To this opinion the plaintiff excepted.

Slaymaker, for the plaintiff in error, cited 4 *Mass. Rep.* 405. *Clow v. Woods*, 5 *Serg. & Rawle*, 286. *per DUNCAN, J. Waters's Executors v. McClellan*, 4 *Dall.* 208. 1 *Cranch*, 316. 9 *Johns.* 201.

W. Hopkins, and *Hopkins contra*, cited 5 *Serg. & Rawle*, 278, 285, 286, 287, 288. 2 *Johns.* 46. *Palmer v. Hand*, 13 *Johns.* 434. *Babb v. Clemson*, 10 *Serg. & Rawle*, 419.

The opinion of the court was delivered by

TILGHMAN, C. J. I cannot say that I perceive any error in the opinion of the Court of Common Pleas. Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to. But there are exceptions. There are certain necessary, and lawful contracts, by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these, that the owner should give up the possession, for a time. Such too, are contracts by which an artisan, or manufacturer, has the possession of materials belonging to another for the purpose of making them up, or repairing them for the owner. No suspicion of fraud can fairly arise, where the transaction is in the usual course of business. But the case is very different where it is intended that the property should be apparently in one, while it is in fact, in another. This is out of the usual course of business, unnecessary, and directly tending to the injury of those who are not in the secret. In the present instance for example, there was a sale of four horses and harness, and possession delivered to a man who got his living by the use of his team. All the world has a right to suppose that he was the owner of the horses which he drove, and a secret agreement to the contrary was an injury to society, by giving the wagonner a false credit which might induce others to trust him with their property. The cases which have generally been brought before courts of justice, are those in which the seller has remained in possession. Those have been adjudged fraudulent. There are innumerable authorities on this subject, but I will refer particularly to *Clow v. Woods*, 5 *Serg. & Rawle*, 286, and *Babb v. Clemson*, 10 *Serg. & Rawle*, 419, because they were in this court, well considered, and recently decided. The principle which governed them, was, that a sale, where possession does not accompany and follow it, is fraudulent as to creditors. It was the separation of the possession

(Martin v. Mathiot.)

from the property which made the fraud ; and the principle applies to the case before us. Here the seller did not retain the possession, but was to retain the property after he had transferred the possession to the buyer. The mischief is the same—a false credit is given ; and whether given to the buyer, or seller, is immaterial. Neither is it necessary, that it should appear, that credit had been given by a third person in consequence of the possession of the purchaser. A rule of law so restricted, would be of very little value. It rarely occurs that a man can prove, what it was that induced him to give credit. It is a rule of general policy, which declares possession to be the evidence of property, and the presumption is, that every man is trusted according to the property in his possession. When the plaintiff put his horses into the possession of *Michael*, he knew that he was making *Michael* the ostensible owner, and was bound to abide the consequences. Between themselves, there is no objection to the property remaining in the plaintiff. But as to the sheriff who knew nothing of the secret condition annexed to the sale, *Michael*, who was the apparent, is to be considered as the real owner.

I am of opinion that the judgment should be affirmed.

Judgment affirmed.

[LANCASTER, JUNE 7, 1826.]

The COMMONWEALTH *ex rel.* MUNDERBACH against REIGART.

The 3d section of the act of 12th of *April*, 1825, requiring each and every county treasurer to settle his accounts before the second *Tuesday* in *December* in each and every year, is confined to treasurers appointed after the 1st of *January*, 1826. The granting an information in the nature of a *Quo Warranto*, is discretionary with the court ; and *it seems* that it will not be granted, when it cannot be brought to trial before the expiration of the office to which it refers.

ON motion of *George B. Porter*, esq. and affidavit filed, a rule was granted on a former day, upon *Emanuel Reigart*, esq. to show cause why an information in the nature of a *Quo Warranto* should not be filed against him, for assuming and exercising the office of treasurer of *Lancaster* county.

Buchanan, for the defendant, showed cause.

The opinion of the court was delivered by

TILGHMAN, C. J. This case came before us, on a rule on the defendant to show cause why an information in the nature of a *Quo Warranto* should not be filed against him, for assuming and exercising the office of treasurer of *Lancaster* county.

The defendant has assigned several reasons against an information, the first of which is, that his case is not within the provisions of

(The Commonwealth *ex rel.* Munderbach *v.* Reigart.)

the act of 12th of *April*, 1825, on which the rule was founded. At the time of the passing of this act, the defendant was treasurer of *Lancaster* county, and the question is, whether he was obliged, by the third section of the act, to settle his account as treasurer, on or before the second *Tuesday of December*, in the year 1825. If he was, it is confessed that he was a defaulter, and the commissioners had no right to appoint him treasurer for the year 1826. The words of the third section are general, "that it shall be the duty of the treasurer of each and every county within this commonwealth, to settle his account, as treasurer, for all moneys by him received for this commonwealth, for tavern licenses, or otherwise, on or before the second *Tuesday in December*, in each and every year."

But it is contended on behalf of the defendant, that from the whole spirit and intent of the act, these general expressions are to be confined to treasurers appointed *after the 1st of January*, 1826. The main object of the act appears to have been, to produce uniformity in the time of the appointment of all county treasurers in the commonwealth, and in the time of the settlement of their accounts. The times of appointment had been various in different counties, and this occasioned a difficulty in ascertaining who was the treasurer of any particular county in the beginning of each year, which was embarrassing to the auditor general and state treasurer. The appointments of county treasurers for the year 1825, had all been made, previous to the passing of the act of 12th of *April*, 1825, and consequently it was impossible to effect a uniformity in the time of appointment of those officers for that year. The first section of the act is prospective, and exclusive of the year 1825. It enacts, that "from and after the 1st day of *January* next, (1826) it shall not be lawful for the judges of the courts of General Quarter Sessions of the peace, or Mayor's Court, to grant any licenses to tavern keepers, at either of the *two last courts* of Quarter Sessions, holden in any year, and all applications for tavern licenses shall be made at the first and second terms of each and every year *hereafter*." The object of this must have been to enable the county treasurers to settle their accounts by the second *Tuesday in December*, which it would have been difficult to do, if licenses had been granted at the two last terms of the year; because these licenses frequently remained in the hands of the treasurer several months before they were taken out, and paid for by the tavern keepers, and the mode of compelling payment, was, by indicting them at the succeeding term, if they had kept taverns in the mean time without taking out a license. Clearly, therefore, this first section was intended for the cases of treasurers appointed after the year 1825.

The second section, directs the commissioners of each county to appoint a treasurer in the first week of *January* in every year *thereafter*, and enacts, that the treasurers so appointed shall hold

(The Commonwealth *ex rel.* Munderbach v. Reigart.)

their offices for one year and no longer, and that all treasurers appointed during that year (1825) shall continue in office until the 31st of *December*, 1825, and no longer. This section secures uniformity in the time of the commencement and expiration of the offices of all county treasurers, who should be appointed on or after the 1st of *January*, 1826. Then comes the *3d section*, on which the present question arises. Besides ordaining that the treasurers of each county should settle their accounts on or before the second *Tuesday of December* in each year, it inflicts a penalty on every treasurer who shall not so settle; viz. he shall not be re-appointed to the office of treasurer, neither shall he be re-appointed unless he produce a certificate from the auditor general, and state treasurer of his account being so settled, and all moneys due by him paid to the state treasurer,—nor shall any treasurer be allowed a commission by the accountant department, who omits to pay over all moneys by him received, *or which he ought to have received*, before the second *Tuesday in December* in each year. Now it could be a matter of but little importance to the commonwealth, whether this third section did or did not comprehend treasurers appointed before the 1st of *January*, 1826, and it cannot be supposed that harsh and unreasonable terms should be imposed on such treasurers, without an adequate object. To alter the duties of an officer who was to remain in office but part of a year, and that too, in points very material to him, would certainly savour of hardship. And this remark is much more forcible when applied to the *sureties* of the treasurer, who became responsible for him on the faith of the law as it existed at the time of their being bound for his faithful execution of the duties of his office. A few weeks difference in the time of settlement, or of payment, might occasion the forfeiture of the bond. So that I should be strongly inclined to the opinion, that the defendant's case was not within the act, if it rested only on the third section. But when we consider the fourth section we shall find that light is thrown on the third, and the argument grows very strong that the general expressions, "*treasurers of each and every county*," should be restricted to treasurers appointed after the year 1825. The fourth section directs, that "the auditor general shall cause suits to be instituted against *the present and prior county treasurers heretofore appointed*, who may be delinquent, and who may, or have refused to settle their accounts, and pay over all moneys on every license heretofore granted, or which may be granted by any court within this commonwealth *during the present year*, agreeably to the usages of the accountant department." Now here is a plain distinction between treasurers appointed for the year 1825, and those who should be afterwards appointed. The former were to be sued, unless they settled their account for all tavern licenses granted during the year 1825, and paid the money over, according to the usages of the accountant department. It was as-

(The Commonwealth *ex rel.* Munderbach *v.* Reigart.)

serted by the counsel for the defendant, and I think not contradicted by the adverse counsel, that it was the usage of the accountant department, to allow three months from the end of each year, for payment of the money due on licenses granted at the last term in the year, because in fact, many of those licenses, although transmitted to the treasurer from the Court of Quarter Sessions, were not taken out, and paid for, by the tavern keepers, until after the end of the year. If this be so, it shows clearly, that treasurers appointed for the year 1825, could not have been required by the third section, to settle their accounts by the second *Tuesday in December*, and make payments in full to the treasurer, by the 31st of *December* in each year. There is an inconsistency between the third and fourth sections, if we apply them both to the case of treasurers appointed for the year 1825, and it is a sound rule so to construe every instrument as to retain all its words, and if possible, preserve consistency in all its parts. I am of opinion, therefore, that the case of the defendant, is not within the provisions of the act of the 12th of *April*, 1825. But even if it were, it would be indiscreet to proceed against him by information, because it is certain, that the cause could not come to trial by a jury until after the expiration of his office. The granting of an information of this kind is discretionary, and why should the court waste time in a fruitless prosecution? The cases cited from 2 *Johns*. 184, and 3 *Mass. Rep.* 385, show the opinion of the Supreme Courts of *New York* and *Massachusetts* on this point, and I agree with them. The counsel for the defendant urged two other reasons against an information, on which I give no opinion, because it is unnecessary. I am of opinion that sufficient cause has been shown by the defendant; and, therefore, the rule should be discharged.

Rule discharged.

[LANCASTER, JUNE 7, 1826.]

MUNDERBACH *against* LUTZ'S Administrator.

IN ERROR.

This court will not reverse a judgment, except for error apparent on the record. If any presumption be admitted, it will be rather to support, than to reverse a judgment.

The omission to instruct the jury on a point, which the verdict has rendered immaterial, is not error.

It is not necessary for the court to answer a proposition submitted for their opinion, in the very words of the proposition. It is enough, if the answer be sufficiently full to be understood.

If a proposition submitted by the counsel to the court, be a mere repetition, in other words, of one which has already been answered, it is not error to refer to the answer already given, or even to omit to answer the proposition altogether; and if it be alleged, that the second proposition is different from the first, it is the duty of the counsel to place the first on the record.

If the counsel of the defendant select that part of the testimony on which he relies, and request the court to instruct the jury that it is a full defence to the plaintiff's claim, and the court, who had previously stated the whole evidence in the case, in their charge, say, "The proposition is correct, and if the jury believe the facts on which it is founded, as stated before in the charge, it is to a bar to the plaintiff's recovery," this cannot be assigned as error by the plaintiff.

This court will not reverse a judgment, where a point is stated fairly by the court below, but not so fully as it might be stated.

Nor will it reverse a judgment because the court below has answered an abstract proposition, which this court may think ought to have been omitted; especially, if the answer be correct.

WRIT of error to the Court of Common Pleas of Lancaster county, in an action brought by *Martin Munderbach*, the plaintiff in error, against the defendant in error, the administrator of *Nicholas Lutz*, deceased.

The nature of the case, and the points in controversy, will be better understood from the opinion of the court, than from any other statement which can be given of them.

After argument by *Hopkins* for the plaintiff in error, and *Buchanan* for the defendant in error, the opinion of the court was delivered by

HUSTON, J. On the 25th of October, 1814, *Henry Good* made his note to *M. Munderbach*, and *Nicholas Lutz*, for four thousand four hundred dollars, payable in sixty days at the Farmers' Bank of Lancaster. *Munderbach* and *Lutz* indorsed the note, and marked it for the use of the drawer who received the money for it at the bank.

On the 27th of December, 1814, this note was protested, and on the 9th of January, 1815, suits were brought against *Good*, the maker of the note, and against *Munderbach* and *Lutz*, who had indorsed it.

On the 24th of April, 1815, judgment was obtained in both these suits.

(Munderbach v. Lutz's Administrator.)

A *feri facias* no. 9, of *August*, 1815, issued in the suit against *Good*, on which his lands were levied and condemned.

To *November*, a *venditioni exponas* issued, which was returned, "Stayed by plaintiff." A *venditioni exponas* against *Lutz*, at the suit of one *Roland*, had issued to this same *November* term, on which the sheriff had exposed the lands of *Good* to sale, and one tract was struck down to *Munderbach*, for eight thousand three hundred dollars, and another to *H. Landis* and *John Lutz*, who were indorsers on two other notes of *Good*, for four thousand nine hundred dollars. But it appeared that the persons to whom these lands were struck down, not having paid the money, the sheriff returned them unsold for want of buyers.

It also appeared, that on the 8th of *November*, 1814, *Henry Good* had another note for thirteen hundred and fifty dollars, indorsed by *M. Munderbach*, and *John Lutz*, discounted at the same bank, and on the 13th of *December*, 1814, *Henry Good* had another note for two thousand dollars, indorsed by *Henry Landis* and *John Lutz*, also discounted at the same bank.

On the 5th of *December*, 1815, the bank received a note for seven thousand seven hundred and fifty dollars, drawn by *Martin Munderbach*, and indorsed by *Henry Landis* and *John Lutz*, payable at sixty days. This note was for the amount of the three notes drawn by *H. Good* before mentioned—and on the back of the note first mentioned for four thousand four hundred dollars, which remained with the bank, was written as follows, "We do hereby acknowledge and agree, that the judgment obtained by the Farmers' Bank of *Lancaster* on this note remain as a security for the note discounted this day for seven thousand seven hundred and fifty dollars: Witness our hands, 5th *December*, 1815, (signed) *H. Good*, *M. Munderbach*, and *John Lutz*."

On the 6th *February*, 1816, the note for seven thousand seven hundred and fifty dollars was renewed.

On the 9th *April*, 1816, it was renewed again, with the name of *Nicholas Lutz* as an additional indorser—This note was protested.

To *April* Term, 1817, a *feri facias*, had issued on the judgment of the bank against *M. Munderbach* and *Nicholas Lutz*, on which the land of *Munderbach* was levied and condemned; and on a *venditioni exponas* to *August*, 1817, it was sold for five thousand and seventy dollars, which, with the sale of some lands of *H. Landis*, and some of *John Lutz*, against whom the bank had proceeded, satisfied the whole of the demands of the bank.

It also appeared, that at *November* Term following, the land of *Henry Good*, was sold for above five thousand dollars, but at whose suit it did not appear. It also appeared that *Munderbach*, and *Nicholas Lutz*, when *Good's* debt was raised and paid to the bank, had never applied to the bank to assign over to them its judgment against *Good*, and that the bank had entered satisfaction on its judgment against *Good*.

(Munderbach v. Lutz's Administrator.)

This suit was brought by *M. Munderbach* to recover from *Nicholas Lutz*, the one half of the sum which the bank had levied from *Munderbach*, his co-indorser. Not one word of the evidence given at the trial of the cause, was before this court on the record returned, except the matters above stated. It appeared, however, from that part of the charge returned, that at least two witnesses had been examined on different points in the cause, and we have some intimation of what was testified by one—but although the other was examined on a point very material in the cause,—we have not his testimony, nor any thing from which it can be inferred, what it was.

A motion had been made at this term to this court, the object of which was to bring the evidence on the record; to the decision and opinion on which I refer.

From the defective manner in which this cause is brought before this court, it is not easy to give a distinct view of what was contended for by the plaintiff in error, and it was not in every part of the case possible to know whether he had or had not cause of complaint.

There were five errors assigned in this court.

The first error assigned is to the charge of the court.

The judge, after stating the facts out of which the cause arose, told the jury, the plaintiff would be entitled to their verdict for one half of the money raised by the bank from the sale of the plaintiff's property, with interest and half the costs, unless the circumstances and facts proved by the defendants would amount to a defence; and concluded by saying, "If the jury are of opinion from the testimony in the cause, adverting to the whole evidence, and particularly to the testimony of *Peter Homan*, that the interference of *Munderbach*, taking into consideration his whole conduct, prevented the bank from recovering its demand from *Good*, and threw the loss on the indorsers, he cannot recover from the defendant in this suit. If they thought differently, he could recover."

This has not been much insisted on. It is possible that if all the facts proved were before us, we might think those facts, and what could fairly be inferred from them would not amount to a defence; but it is possible that facts were proved which would amount to a perfect defence. This court do not, and will not reverse except for error apparent—we must not suppose error—it must be shown to us—if we presume at all, it will be to support—not to reverse a judgment.

The second error assigned is—There is error in the answer to the fourth original point of the plaintiff.

The first three points submitted to the court by the plaintiff are not before us—the counsel have stated what some of them were; but they are not on our record—nor are the answers given to them before us—but we find on our record a proposition numbered as

(Munderbach v. Lutz's Administrator.)

the fourth, proposed by the plaintiff, as follows, "The plaintiff is entitled to recover of the defendant the one half of the money levied by the sheriff from the sale of his property in satisfaction of the said note, with interest thereon from the day of the sale, the 31st of May, 1817, or the day of the writ returned." To which the court answered, "This is merely a repetition of the last, in other words, and the court answer, that the plaintiff may recover, if there is nothing in the defence set up by the defendant."

The error alleged is, that the court did not answer in the very words of the proposition, and did not expressly state he could recover the principal and interest.

I see no error here—for it is a full answer to the proposition, and would be so understood. The fair construction is, considering it in relation to the proposition, that it admits the plaintiff's right of recovery as claimed by him—very properly adding, "if the jury think there is nothing in the defence set up by the defendant."

But the court tells us, it is a mere repetition of the third proposition in other words:—if so, and the answer to the third was correct, I do not see that there would have been error in omitting to answer it altogether. The counsel says, it was not a repetition of the third. Now he could have had the three first here. If the error in the fourth was only apparent, on comparing it with the prior one—it was necessary that the prior one should be before us.

The jury have found for the defendant generally. I do not see what error there could be in omitting to give a precise opinion as to interest, where no principal is found due. If the jury had found the principal sum for the plaintiff without interest, the omission to specify interest might have been of serious injury to the plaintiff. Under the circumstances apparent on this record, it can only be called an omission of what was immaterial.

But it is not omitted in the charge as returned; the court expressly say, *Munderbach* is entitled to interest, unless the defence is sufficient. There is no error in this part of the cause.

The third error assigned has not been insisted on—it is nearly the same with the first, on which we have remarked already.

The fourth and fifth errors assigned, apply to the third and fourth points proposed to the court by the defendant's counsel, and differ only in this, that the fifth applies to the latter point, alleging the same error in it which the fourth had stated to the third point. The error alleged is this. The counsel for the defendant, had selected that part of the testimony on which his client relied, stated it no doubt, as strongly as it would bear, and requested the court to give in charge to the jury, that it was a full defence to the plaintiff's claim. That the counsel of the one party, and of the other, should state the facts of the cause as favourably to his client as he can; that he should draw his conclusions of law as strongly

(Munderbach v. Lutz's Administrator.)

on his own side as his ingenuity can make plausible, is no doubt an evil, but it is an old one, and I believe too inveterate to be corrected. The *court*, however, ought to state the evidence fairly to the jury, and to inform them, that of the facts they are to judge, and to instruct them what the law is, if facts are believed to be in one way, and what, if in the other. By our practice, a judge in his charge generally states the facts given in evidence, and the law applicable to the case, and leaves it to the jury to apply the law to the facts as they shall find them to be. In addition to this, the counsel on each side calls the attention of the court to certain propositions, calculated to promote the interest of their respective clients, and too frequently state the evidence, at least partially. It would be tedious in the extreme, for the judge to recur to the whole testimony, and repeat the whole of it in his answer to each of these propositions; it is enough if he refers to it generally; if he tells the jury the cause depends not on that portion of the testimony, stated in the points under discussion, but on the whole evidence in the cause. And it appears to me, this is precisely what the judge has done. The court say, "this proposition is correct, *and if the jury believe the facts on which it is founded*, as stated before in the charge, it is a bar to the plaintiff's recovery in this suit." The whole of a judge's charge is to be taken into view. The point to which the attention had been called, was the same, which is the subject of the first error before mentioned. In the charge, the court had stated all the evidence, and had told the jury they must advert to the whole evidence. The court say the proposition is correct, and so it was if the premises were true; but the court add, "*and if the jury believe the facts on which it is founded*," &c. It seems to me there is no error in this. It cannot be seriously supposed this court will reverse, because a point *fairly stated*, is not *stated as fully* as it was possible to state it. But to the assignment of the fifth error, is added, "that the last sentence of the defendant's point, submitted to the court, is an abstract proposition not pertinent to the cause, and as stated, had a tendency to mislead the jury." It has been decided that if the court do not answer every point proposed to them, it is error, if the point not answered has any bearing on the cause trying. Our system as to this matter is not yet old—perhaps not yet fully formed. It would seem to me not to have been the intention of the legislature to entangle the administration of justice in form. Most causes require only the application of one or two principles to the facts. Yet we often see points proposed in terrible array of a dozen, or a score, each of which, however, has some relation to that branch of the law, to which the case trying belongs. We have already required an answer to each, which has any bearing on the cause. It seems to me it would be going beyond our duty to reverse, because a judge had answered propositions which we may think ought to have been omitted—especially where the an-

(Munderbach v. Lutz's Administrator.)

swer is correct. If the answer mistakes the law, there would seem to be more cause of complaint; but even this has been decided to be no error, where the point proposed has no application to the cause trying.

There were other matters discussed before us which do not appear in the list of errors assigned, and which do not appear to have been brought to the view of the Common Pleas, of which we only say, we cannot notice them. On the whole, there does not appear any cause for reversing the judgment of the court below, as the record comes before us; and we must suppose the plaintiff in error has brought it up in as favourable a point of view as possible.

Judgment affirmed.

[LANCASTER, JUNE 7, 1826.]

RUSH and others, Assignees of HART, *against* GOOD.

IN ERROR.

Where the assignees of a debtor, have sold the property, and received money enough to pay all the debts of the assignor, an action will lie against them, (if all have received the money and all are equally liable,) to compel payment to a creditor, whose claim against the assignor is established.

But whether an action can be supported for a proportion or rateable share of the debt claimed by the plaintiff, until he has proceeded against the assignees, so far as to have a dividend declared and distribution ordered, as directed by the act of the 24th of *March*, 1818, "to compel assignees to settle their accounts," &c. *quære?*

A count against such assignees, setting forth the assignment, naming the defendants as trustees, and averring that they had collected money enough to pay all the debts of the assignor, may be joined with a count for money had and received, in which the defendants are not named as trustees; both counts charging them personally.

But, under such a declaration, the plaintiff can only recover the money actually received by the defendants, and not, what with due diligence, they might have received.

If several papers, purporting to be accounts of the assignees of a debtor, or some of them, be found together in the prothonotary's office, one of which papers purports to exhibit the property unsold, a second the property sold, a third the sums paid to the different creditors, a fourth the debts still due, &c., and they were all filed at the same time, they make together but one account; and if one of them be given in evidence against the assignees, it makes the others evidence for them; and this, whether they are considered public or private papers. And if it be alleged, that one of the papers was made out since the commencement of the suit, and this does not distinctly appear, the whole should go to the jury, with directions to disregard the one objected to, if they should be of opinion that it was not put in with the others, before the commencement of the suit.

If one of several defendants, enter a rule of arbitration for himself and his co-defendants, but without any authority from them appearing, and, upon an award against them, enter an appeal, representing himself in the same character, after which the cause is tried, and a verdict and judgment given against the defendants, this cannot be taken notice of by this court, as error. The cause must be considered as legally in court, unless some one of the defendants should come and deny the right of appealing for him, and support his denial, at least by his own affidavit.

THE record of this case, having been returned on a writ of error to the Common Pleas of *Lancaster* county, the questions arising upon it were argued by

Hopkins, for the plaintiffs in error, and

Wright, for the defendant in error.

The facts connected with the points decided, and every thing necessary to enable the reader to understand them, will be found in the opinion of the court, which was delivered by

HUSTON, J. *John Good*, the plaintiff below, brought this suit against *Henry Rush*, *Adam Goehinoer* and *Samuel B. Moore*, styling them trustees of *Benjamin Hart*.

(Rush and others, Assignees of Hart, v. Good.)

The declaration contained two counts. The first stated, in substance, that *Benjamin Hart*, on the 1st of *January*, 1816, was indebted to *John Good* in the sum of eight thousand dollars, and promised to pay the same. That afterwards, on the 13th of *April*, 1816, by a deed of assignment, he transferred to the defendants (naming them) all his real and personal property, in trust to sell and dispose of the same for cash, and appropriate the same to pay the debts of the said *Benjamin Hart*, in the order in the said deed mentioned; and averred that the said defendants had, in pursuance thereof, taken into their possession all the real and personal property of the said *Hart*, and disposed of the same, and collected debts due and owing to the said *Hart*, and from the sale of property and collection of debts, had *collected and received* into their possession, a large sum of money, viz. sixty thousand dollars, a sum sufficient to pay all just claims and demands due and owing by the said *Hart*, whereby action had accrued to the said *Good* to have and demand, &c., of which the defendants had notice, and in consideration thereof assumed, &c. &c.

The second count was the common one for money had and received.

On the trial of the cause, the opinion of the court was desired on the first count,—whether the two counts could be joined,—whether the suit could be supported by the plaintiff against the defendants, on the evidence given, and two bills of exception were taken as to testimony admitted or rejected.

In this court several errors were assigned:—

1. “There is no cause of action in the first count in the declaration, and the verdict being taken generally” is erroneous.

It was contended that the creditors of the assignor must pursue the directions of the act of the 24th of *March*, 1811, “to compel assignees to settle their accounts, and for other purposes,” and that in no case can a suit at common law be instituted by a creditor against such assignees. This court is not of that opinion. Where the assignees have sold the property and received money enough to pay all the debts of the assignor, an action will lie to compel payment to a creditor, whose claim against the assignor is established. This is where the trustees have all received the money, and are all equally liable. On the face of this count, then, there is stated a sufficient cause of action.

Second error assigned. “The first count is against the defendants as trustees of *Hart*; the second against them personally. These counts cannot be joined.”

This objection seemed to have been made under an idea, that a verdict and judgment on the first count, would only have affected the trust property. This is not however the case,—both the first and second counts charge the defendants personally.

Third error. It appeared a rule of reference had been entered in this cause by *Adam Goehinoer*, representing himself as acting

(*Rush and others, Assignees of Hart, v. Good.*)

for himself and the other defendants, but no authority appeared from them. There had been a report, from which an appeal was taken by the said *Goehinoer*, representing himself in the same character; after which came the trial, verdict, and judgment: and we think we cannot take notice of this as error. If *Goehinoer* had authority, all is right; if he had not, still, as the power to bring back the cause was equal to that which removed it, we see nothing to object to. If never *legally* referred, it is as if never referred. If the cause had rested on the report of the arbitrators, and the plaintiff had issued execution for the sum awarded, it would have been necessary to decide whether the other defendants were bound; but when the cause was restored to the court by the same person and the same authority which withdrew it,—where both parties have considered it in court after the appeal, and proceeded to trial, we must consider it legally in court, unless some one of the defendants would come and deny the right of appealing for him, and support his denial at least by his own affidavit.

The next errors assigned, are to the admission in evidence of two papers, and the rejection of a third.

The act to compel trustees to settle their accounts, gives to the Court of Common Pleas power to compel trustees to exhibit in court an account of the property received, and of the manner in which they have disposed of it. The words of the act would seem to grant this power only on the application of a creditor. No such application to the Common Pleas was alleged, but certain papers purporting to be accounts, or purporting, if taken altogether, to exhibit some account of the property received, were found in the office of the prothonotary of the Court of Common Pleas. One of them purported to be an account of *Henry Rush*, one of the trustees, of such property as came to his hands, and his application of the same, showing that a balance of ninety-seven dollars was in his hands. It was indorsed, "*March 13th, 1820, read, and ordered to be filed.*" This account was signed and sworn to by *Henry Rush*. Another of these papers was marked, "*filed.*" It was not signed by any person, nor sworn to, nor any date affixed to it. It purported to give an account of property which had belonged to *Benjamin Hart*, and which had been sold, amounting to nine thousand eight hundred and forty-nine dollars and ninety-three cents; and an exhibit of monies applied to the payment of *Hart's* debts by *Adam Goehinoer*, to the amount of seven thousand four hundred and seventy dollars and eighty-two cents, and by *Rush*, to the amount of one thousand four hundred and thirty-eight dollars and twenty-five cents. The part relating to the disbursements by *Rush*, agreed with the account of disbursements in his separate account, before mentioned.

There was also a third paper, containing an account of property received from *Hart*, and not sold, and which, as it stated, the trustees had offered for sale unsuccessfully. This paper had no date,

(Rush and others, Assignees of Hart, v. Good.)

nor was it signed by any person; but, so far as stated, it was in the same handwriting as the two other accounts. There was, however, attached to it, a statement, specifying particularly the amount due from *Benjamin Hart* to *S. B. Moore* and *Adam Goehinoer*, two of the trustees, on bonds, mortgages, &c. This last was in the handwriting of *S. B. Moore*, one of the trustees. It was not indorsed. The clerk in the prothonotary's office had no recollection of the time or manner in which any of the papers were put in the office, nor could he state whether this last paper was originally with them; but he stated that it had been seen by him two or three years before the trial,—“that it used to be inside of the other papers, and that when a copy of them had been required, it had also been copied by him.” The plaintiff offered to give the two first mentioned papers in evidence to the jury. The defendants objected to them, and also objected to the two being shown to the jury, unless accompanied by the third. The court admitted the two first, and the defendants excepted. Afterwards, the defendants offered the third paper. The plaintiff objected to it, the court rejected it, and the defendants excepted. I shall consider the two exceptions together.

These papers were either public office papers, or they were not. Whether a trustee or trustees can, under the fair construction of this act, exhibit and settle an account in the Common Pleas, where no creditor has cited them, and how far such an exhibition and settlement would be evidence, if sworn to and submitted to the court, and approved by them, we do not say. This is not the case: two of these papers are not sworn to, and none of them appear to have been submitted to the court, and approved by it. Trustees are answerable, generally, each for what he receives, and for no more. It would then seem that each may file a separate account, even where cited under the act, or they may join in an account. Their accounts, when filed, may be all on one sheet of paper or on several; but if on several, one of which exhibits property unsold, another property sold, another the sum paid to different creditors, and another debts still due; and these are all filed at one time, they all make but one account, precisely as if they were all on the same paper; and where one part is given in evidence against trustees, it draws in the others for them. This is so generally.

But the plaintiff contends, that these were not public papers,—that they were improperly lodged in the prothonotary's office,—that he had a right to read them, as being made out by the defendants, and to charge the defendants, and to read only such of them as he pleased. It seems to me this makes his case worse. When a defendant or defendants have exhibited an account to a plaintiff, he may generally give it in evidence against them. I am not so clear, that if by accident he finds a paper made out by *one of them*, without date or signature, he can in all cases give this in evidence against them. Perhaps it may generally be read as evidence

(Rush and others, Assignees of Hart, v. Good.)

against the one who made it out, but I see no reason why it should be evidence against the other trustees, who are only answerable, each for what he himself admits, or what is proved against him. In the supposed case, however, if one of the papers so found is produced and read as evidence, the whole must be produced. It is like the case of a confession, and you must take all or none.

The plaintiff, however, alleged, that all these papers were not made out at the same time. If they were public office papers, why is the time when they became so material? If private papers, exhibiting a statement of trustees' accounts, and the plaintiff offers them as containing such exhibition, it is not easy to see how part of an account made out on one day, is evidence to charge a man, and another, made out the next, is not evidence to discharge him. I speak of the case where the plaintiff produces a bundle of papers, found all at the same time, in the same place, and all relating to the same matter. But he says, the last paper was made out since this suit commenced. If that were clearly so, it ought to have been rejected. Whether it were so or not, was a question of fact, and the whole three papers found together in the office ought to have gone to the jury, with directions to disregard one of them, if they should be of opinion that it had not been put in with the other papers before this suit was instituted. This paper was not evidence for the defendants, except as forming a part of the whole account. When the others were received, it became evidence or not, according as the jury found it to be, or not to be, a part of the exhibition of their accounts by the defendants.

The next error assigned, is to the opinion delivered by the court, in answer to sundry propositions submitted to them by the defendants' counsel. The court instructed the jury, that the defendants were liable for the amount which was raised, *or which, with due diligence, might have been raised from the property assigned to them.* The declaration had stated, that they had actually received money enough to pay all the debts of *Benjamin Hart*, and if the plaintiff had made out that case, which may often prove a difficult undertaking, and if his *claim against the assignor was established*, I have said the plaintiff might have recovered, for the defendants would have received money for his use; but, on this declaration, he could not recover money not received by them; he could not, in this form of action, recover damages for neglecting to sell the property assigned. If he intended to charge them for negligence or misconduct, he ought to have framed his declaration accordingly; as it has several times been decided, in this court, that the plaintiff, in this form of action, can recover only what has been received, and not what ought to have been; and that this action cannot be supported by proving that the defendant has received goods, or even bonds for the payment of money. I shall only refer to those cases.

As this cause is to be sent back to the court below, it may not

(Rush and others, Assignees of Hart, v. Good.)

be amiss that the counsel of the plaintiff should consider well whether he can support his case for a proportion or rateable share of the debt claimed, until he has proceeded against the trustees so far as to have a dividend declared, and distribution ordered, as directed by the act of assembly.

If the allowance to trustees is to be fixed by a jury, each jury in each different suit may fix a different allowance.

If the rateable allowance is to be ascertained by a jury in each case, then evidence to substantiate every debt claimed must be before the jury in every suit, and the trust estate might be wasted by expense, and, after all, each jury might differ in the proportion coming to the creditor,—one might get fifteen shillings in the pound, another ten shillings, and another five shillings.

Trustees are each liable only for what he has received. If it should appear that one trustee has received one hundred dollars, another one thousand, and a third ten thousand, will it be pretended that each is liable for the other?

Perhaps our law may be so construed and applied, as that the court will, on application under the act of assembly, ascertain the sum in the hands of each, and that suits may be sustained against each for the proportion of the dividends declared and ordered to be distributed.

As that act is not before us, it would be wrong in me to go into a full explication of it, and of the proper way of proceeding under it, though not amiss to suggest some things to the consideration of the parties, if it were only, lest if the cause should come back here, to prevent them from then asking, why we did not suggest these things when it was here the first time.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, JUNE 7, 1826.]

BITZER'S Executor *against* HAHN and Wife.

IN ERROR.

Testator bequeathed as follows:—"Item, I give and bequeath unto my two youngest sons, each of them, the sum of four hundred pounds, to be paid for their use out of the first money which comes into the hands of my executor, out of my estate. Item, I give and bequeath unto each of the children of my daughter *B.* two hundred and fifty pounds, to be paid to them out of the money which may come into the hands of my executor, after the legacies are paid to my said two youngest sons; but it is my will, and I order, that if any of my sons or grandchildren, to whom I have given the said legacies, should die in their minority, and without issue, then such legacy shall be divided to and amongst my six children, to whom I have given the residue and remainder of my estate."

Held, that by comparison with other parts of the will, and under the circumstances of the case, the executor was liable for interest upon the legacies to the testator's grandchildren, from the time he had sufficient funds in his hands to pay them, after payment of the other legacies, which had a priority by the will; and not merely from the time a demand was made, and a refunding bond tendered.

Rules with respect to the payment of interest on legacies.

If the record state, that the court below instructed the jury as the plaintiff in error requested, without setting forth particularly what the instructions were, it is not error.

WRIT of error to the Court of Common Pleas of *Lancaster* county.

Samuel Hahn and *Joanna* his wife, the defendants in error, brought this action, in the court below, against the plaintiff in error, the executor of *John Bitzer*, deceased, to recover a legacy, claimed in right of the wife, who was the daughter of *Barbara Meixel*, deceased, who was the daughter of the said *John Bitzer*, under the following clauses in his will:—

"Item, I give and bequeath unto my two youngest sons, to each of them, the sum of four hundred pounds, lawful money of *Pennsylvania*, to be paid for their use out of the first money which comes into the hands of my executor, out of my estate. Item, I give and bequeath unto each of the three children of my daughter *Barbara*, the sum of two hundred and fifty pounds, lawful money of *Pennsylvania*, to be paid to them out of the money which may come into the hands of my executor of my estate, after the legacies are paid to my said two youngest sons. But it is my will, and I order, that if any of my sons or grandchildren to whom I have given the said legacies, should die in their minority, and without issue, then such legacy shall be divided to and amongst my six children, to whom I have given the residue and remainder of my estate."

It will be perceived, that in the opinion delivered by this court, other parts of the will are referred to; but they did not appear upon the record, as it came into the hands of the reporters.

Joanna Hahn attained the age of twenty-one, on the 22d of

(Bitzer's Executor v. Hahn and Wife.)

April, 1822, and on the 5th of *January*, 1823, a refunding bond was tendered by the plaintiffs to the defendant below.

On the trial, the defendant below requested the court to give the following instructions to the jury, and to file their opinion of record:—

“1. That a legacy, after it becomes due, is payable on demand, and it is the duty of the legatee to call upon the executor for it; and not the business of the executor to hunt the legatee up to pay it to him.

“2. That there is no time expressly fixed for the payment of the legacy, and in case the legatee died under age and without issue, then it was to be paid to others; the time of payment, according to the true construction of the will, is the legatee's attaining the age of twenty-one years.

“3. That when interest is not directed to be paid on a legacy to a grandchild, before the time of payment no interest can be demanded upon it.

“4. That where a legacy is given, payable at a particular time, and the legatee, from infancy, is incapable of receiving it and giving a discharge, the executor is in no default in holding the legacy until there is a person authorized to receive it.

“5. That in this case, as the legacy was contingent, no person capable of receiving and giving a discharge, and no refunding bond tendered and demand made until the 15th of *January*, 1823, nor, at any time, any bond to indemnify and save harmless against the contingency, offered to the executor, no interest can be recovered until the refunding bond was tendered.

“6. That if the jury believe, from the nature of the estate, that it was not sufficient to furnish funds for the payment of this legacy until she attained twenty-one years, owing to the debts to be settled, as well as the legacies to *Solomon* and *Lazarus* of eight hundred pounds, to be first paid, that then no interest would accrue before the 15th of *January*, 1823, when the legacies were demanded.”

The charge of the court, on the first, second, fourth, and sixth points, it was stated in the record, “was in the affirmative, and the jury instructed on them accordingly.”

The third point, the court answered thus:—

“It is not the law, *in all cases*, that when interest is not directed to be paid, on a legacy to a grandchild, none can be demanded upon it, before the time of payment.

“If you are of opinion, that the testator invested his executor with funds and means sufficient to discharge all his debts and legacies, interest is recoverable by the grandchild, the legatee, from the time the executor received the funds and means of payment, until the grandchild became of age, and it was the executor's duty to raise and apply the funds out of the proper sources, agreeably to the directions of the will.”

(Bitzer's Executor v. Hahn and Wife.)

The answer of the court to the fifth point was as follows:—

“Payment of the legacy was not compellable until it was demanded, and a refunding bond tendered or filed; any interfering contingency, by the legatee dying before the age of twenty-one, was removed by her becoming of age. But interest is recoverable on the legacy from the time a fund reached the hands of the executor, out of which it might have been paid, without obstructing the satisfaction of debts and a discharge of legacies to those who had priority by the will.

“You will review the evidence, ascertain what funds came to the hands of the defendant, at what time he received them, or they were in his power and available, how he appropriated them, and date the commencement of interest from the time the executor had the means of paying it. According to the answer given to the defendant's points, the principal legacy the plaintiffs must recover, if the evidence is credited.”

The counsel for the defendant excepted to the opinion of the court, and, on the removal of the record to this court by writ of error,

Hopkins, for the plaintiff in error, contended, *first*, that the declaration set forth no cause of action, because there was no averment that the wife, to whom the legacy was given, had attained the age of twenty-one before the commencement of the suit; or, if she was entitled to receive it before twenty-one, there was no averment that security had been tendered to the executor, to refund in case of the death of the legatee, before reaching the age of twenty-one years. If a legacy be given to be paid at twenty-one, and in case of death before twenty-one, to go over, it does not vest until twenty-one. *Palmer v. Mason*, 1 *Atk.* 505. So, where a legacy was given to a granddaughter, to be at her disposal in case she marries with the consent of a certain person, and she died before marriage, the legacy was held not to have vested, though there was no devise over; the marriage being a condition precedent. *Elton v. Elton*, 3 *Atk.* 508. A legacy payable at a future time, except to a child, does not carry interest, until after it becomes payable. 2 *Johns. Ch. Rep.* 628. A grandchild does not stand on the same ground. A contingent legacy to a grandchild does not bear interest. *Houghton v. Harrison*, 2 *Atk.* 329. *Butler v. Freeman*, 3 *Atk.* 59. 2 *Madd. Ch.* 70. *Miles v. Wistar*, 5 *Binn.* 477. An executor cannot with propriety put out at interest money applicable to the payment of a legacy, and therefore is not bound to pay interest. The act of assembly of 1772, *Purd. Dig.* 410, enacts, that previous to the action, there must be a reasonable demand and tender of security. This, forming a part of the basis of the action, and the attainment of full age being the very gist of it, they should have been averred in the declaration. It is a defect not helped by the verdict, which does not cure the want of substance.

2. The first, second, fourth, and sixth points were not answered

(Bitzer's Executor v. Hahn and Wife.)

by the court. The charge is not put upon the record, and it is only said, that "the points were answered in the affirmative, and the jury instructed accordingly." In what manner the jury were instructed should have appeared, that this court might judge of the correctness of the opinion of the court below, of which, in this state of the record, no idea can be formed.

3. In their answer to the third and fifth questions submitted by the defendant, the court below were in error. Interest is not payable to a grandchild, where it is not directed to be paid, and where no time is fixed for the payment of the legacy. 2 *Johns. Cu.* 200. At all events, the executor was not liable for interest on the legacy, until a demand was made and a refunding bond tendered; but the judge instructed the jury, that he was chargeable with interest from the time funds came into his hands to pay the legacy. Interest accrues only from the time the legacy is demanded. *Popham*, 104. 1 *Leon.* 17. 2 *Eq. Ab.* 564, pl. 1, 2, 3.

Ellmaker, for the defendants in error, observed, that the will of *John Bitzer* was dated the 11th of *July*, 1809, and was proved the 7th of *March*, 1810. *Mrs. Hahn* came to age the 2d of *April*, 1822. A refunding bond was tendered the 15th of *January*, 1823; after which, viz. to *January Term*, 1823, the suit was brought. It did not follow, he argued, that even supposing the legacy was not payable until twenty-one, the declaration must aver that the legatee had attained that age before the institution of the suit. Where it appears on the record, that suit was brought before the money was due, the judgment will be reversed. 11 *Serg. & Rawle*, 130. But it does not appear on this record, that the legatee was not twenty-one at the commencement of the action; and, in point of fact, she was at that time above twenty-one. But this legacy was payable before twenty-one. The will directed, that it should be paid out of the funds which should come to the hands of the executor, after payment of the legacies to his sons, without reference, in that respect, to the age of the legatee. The want of a refunding bond, if none had been tendered, might have been pleaded in abatement. *Hantz v. Sealy*, 6 *Binn.* 413. It was not necessary that the declaration should contain any averment on the subject. Here the defendant pleaded payment, which waived the defect, if the omission of such an averment was a defect.

2. The record shows the direct assertion of the judge, that he did answer the first, second, fourth, and sixth questions of the defendant below, and the manner in which he answered them. This assertion cannot be contradicted.

3. With respect to interest, the charge of the court below was, that the executor was liable to interest from the time the funds came into his hands; a charge, which if erroneous at all, was so as respected the plaintiffs below, because interest ought to have been given from the end of a year after the testator's death; whereas it was only given from the end of three years. The cases cited from *Leonard* and *Pop-*

(Bitzer's Executor v. Hahn and Wife.)

ham on the subject of interest are not law. They have been frequently overruled. If a legacy be given to a niece, payable at twenty-one or marriage, interest is allowed before twenty-one or marriage. *Acherly v. Wheeler*, 1 *P. Wms.* 783. Where a legacy was given to a niece of seventeen, to be paid at twenty-one, and if she should die before twenty-one, then over; interest was decreed in the mean time. *Nicholls v. Osborn*, 2 *P. Wms.* 419. So where five hundred pounds were given to an infant grandson, and if he died before twenty-one, over; interest was decreed during infancy. *Taylor v. Johnson*, 2 *P. Wms.* 504. Many other authorities are to the same purport. 2 *Eq. Ab.* 5 5. 2 *Roberts on Wills*, 97. *Fox v. Wilcocks*, 1 *Binn.* 199. *Callaghan v. Hall*, 1 *Serg. & Rawle*, 246. *Obermeyer v. Nichols* 6 *Binn.* 162. *King v. Diehl*, 9 *Serg. & Rawle*, 421. *Flintham's Appeal*, 11 *Serg. & Rawle*, 16. 4 *Bac. Ab.* 393, 394, 404. Lord ALVANLY was of opinion, that children and grandchildren were on the same footing as to interest. 2 *Roberts on Wills*. 102.

The opinion of the court was delivered by

DUNCAN, J. This is an action for a legacy against the executor of *John Bitzer*, by *Hahn* and wife, the daughter of *Barbara Meixel*, deceased, who was the daughter of the testator, and who died before making the will. It depended upon the following clause in the will: "*Item*, I give and bequeath unto my two youngest sons, each of them, the sum of four hundred pounds, to be paid for their use out of the *first money* which comes into the hands of my executor, out of my estate. *Item*, I give and bequeath unto each of the three children of my daughter *Barbara*, two hundred and fifty pounds, to be paid to them *out of the money which may come come into the hands of my executor of my estate*, after the legacies are paid to my said two youngest sons; but it is my will, and I order, that if any of my sons or grandchildren, to whom I have given the said legacies, should die in their minority and without issue, then such legacy shall be divided to and amongst my six children, to whom I have given the residue and remainder of my estate."

The wife of *Hahn* attained the age of twenty-one before the commencement of the action, and the main question respected the interest of her legacy from the time it bore interest, and whether any interest was demandable before demand and filing of the re-funding bond. I have not heard, and it is difficult to imagine any reason, why the executor should not be accountable for the interest to somebody; either to the pecuniary or residuary legatees. It is against all reason, that he should hold it for ten years without payment of interest to any body, and the residuary beneficiaries of the testator have no claim either in law or in equity.

The plaintiff in error contends, that the legacy to the children of *Barbara* was contingent, and, if so, it was contingent likewise

(Bitzer's Executor v. Hahn and Wife.)

as to the legacies of the testator's own children, and therefore interest was not demandable until it vested, when they came of age. It will be difficult to draw a line between the children and grandchildren. The bequest and the limitation over are in the same words; and though it is generally true, that children might be entitled to interest by way of maintenance, which grandchildren would not, yet this is a matter of mere intention, to be drawn from the four corners of the will. The testator may show, that he considered himself in *loco parentis*. The bequest, I have stated, was in the same words. The mother was dead. There is one clause in this will, which shows that the testator considered himself as standing in the relation of a parent, and making the same provision for his daughters as his granddaughters, representing their mother; and this is the bequest of the furniture, which he divides into five parts, one fifth part to each of his living daughters, and the remaining fifth part to the two daughters of his deceased daughter *Barbara*. And there is another clause which indicates his intention; that is, the devise to *George* and *William Nuts*, of a tract of land, charged, as *Andrew Bitzer's* land was, with the payment of eleven hundred pounds; three hundred pounds in hand to be paid to his executor, and the residue in small instalments; and directs that to *Jacob Shirk* and *Hannah Shirk*, the step brother and sister, shall be paid four hundred pounds each, to be paid to them, *without any interest*, when they shall come to the age of twenty-one. This difference of expression shows a different intention as to interest.

The legacies to his children and grandchildren, were not contingent, but vested, subject to be divested on the death of any one under twenty-one years, without issue, and then given, on that event, to his residuary legatees. It was a legacy *in presenti* to an infant, limited over on his dying without issue, under age; in which case, whether it is by a father or a stranger, the Court of Chancery always decrees interest until the infant comes of age. The cases on this subject will be found in the note to *Small v. Dee*, 2 Salk. 415, (*Phil. Edition*.) The case of *Taylor v. Johnson*, 2 P. Wms. 504, is in terms this case. A., by will, devises five hundred pounds to his infant grandson, *without appointing any time of payment*; with provision that if the grandson dies before twenty-one, then the legacy to go over to B. The Master of the Rolls said, it was extremely clear that this was a condition subsequent, and therefore, as the infant's death before twenty-one will defeat the legacy from the time it happens, consequently, in the mean time, it shall carry interest at least from the end of the year after the testator's death. This will not hold where the legacy is contingent, and not immediate and vested. *Heath v. Perry*, 3 Atk. 101. Indeed this case is stronger in favour of interest, for here the time was fixed; when the money would come into the hands of his executor.

(Bitzer's Executor v. Hahn and Wife.)

There can be no reasonable doubt, but that a court of chancery would decree the interest in this case, and, as we have no court of chancery, this authority must from necessity be conferred on the courts of common law, by the act respecting the recovery of legacies. It is unnecessary to decide, whether the legatees could sue for the principal before twenty-one, or whether the court would require them to give security for payment over to the remainder man. The rule of chancery, requiring tenant for life of a chattel to give security that the goods should be forthcoming at his decease, has been altered, and it is now the practice only to exhibit an inventory, to be filed. *Westcott's Lessee v. Cady*, 5 Johns. Ch. 348. *Miles v. Wistar*, 5 Binn. 480, was decided upon the special provision as to how the interest was to be disposed of, until the legatee arrived at twenty-one. It was to accumulate, and the principal and interest to be paid to them respectively when they arrived at that age; if any died under twenty-one, or without issue, the share of such one to be divided among his brothers and sisters. The share so given, was the principal and interest. In the case of *Hasanclever v. Tucker*, in the High Court of Errors and Appeals, 2 Binn. 525, (App.) the testator gave to H. L. his estate at Longstown, estimated at three thousand pounds, and the further sum of one hundred pounds, to be paid to him at lawful age, meanwhile to be placed out at interest, on good security, for his use; but, in case he departed this life unmarried, the bequest of money to be void, and the whole to sink into his residuary estate. It was decided, that the legacy was not to await the expiration of his life estate, but was payable one year after the testator's decease, though there, as here, it was to go to residuary devisees on his death unmarried. The remoteness or propinquity of the event can make no difference in the construction. When was this legacy payable? When the instalments on the land devised to Andrew were paid, after taking out of the first instalment, the sons' legacies. It then clearly was a vested legacy. *Debitum in presenti*, though *solvendum in futuro*; and, consequently, a vested legacy payable at a stated time, must carry interest from the time of payment. Where no time of payment is fixed, but the legacy is given generally, a year after the testator's decease, unless in the case of a child, where interest is allowed in nature of maintenance. A year after the testator's death, unless some other time of payment is fixed. Interest is given for default of payment; it is given when the payment is delayed. The time of payment governs the commencement of interest, except that a legacy given to a child by a parent, carries interest from the death of the testator, because it is in the nature of a portion, and therefore interest in the mean time is added, though not given in express terms. When, (independently of all question of this legacy of their grandfather being in the nature of a portion,) was this legacy payable? It was to be paid to them out of the money which came into the hands of the executor, after

(Bitzer's Executor v. Hahn and Wife.)

the legacies were paid to his youngest sons. The principal fund was two thousand seven hundred pounds, charged on the land of *Andrew* by the will. Then, when sufficient to discharge the sons' legacies became due, the subsequent payments were a fund in the hands of the executor, to be paid to his grandchildren at stated times, as the money was received. The executor was their trustee. I by no means think, that executors are bound to hunt up the legatees, and tender them the legacy, or that a suit can be brought against them without a demand and filing a refunding bond. This is for the security of the executor. He is not bound to pay before that security is tendered; but I cannot doubt but that he is liable to an infant for interest, after a year, where no day of payment is fixed; and, where a day of payment is fixed, from that day, though no demand is made or bond tendered. The right of action depends on this; but the right to interest on the will of the testator. The executor is no more than a trustee. He will be discharged of interest on a case properly made out, viz. that he never used the money; that he had it always by him; that he was *semper paratus* to pay it. But where he mingles the money with his own, uses it as his own for ten years or more, the law will presume that he made interest, and it is a clear case for interest. *Munford v. Murray*, 6 *Johns. Ch. R.* 17. Every case of this kind depends upon its own circumstances. The residuary devisees can lay no claim to it. Theirs was a remainder, after payment of the legacies. It has been contended, that there was laches on the part of the legatee. In the relation in which the executor stood, he cannot avail himself of this pretext. He was the uncle of these orphans, deprived of their parents. He stood, in point of equity, as their natural guardian. If the money lay out, it would bear interest to the legatees. If he called it in, it would not be requiring too much of him to apply, as their next friend, to the Orphans' Court, to have guardians appointed, to whom the money, or the interest at least, would have been paid over, and then interest would have been recoverable from the guardians. They, under the direction of the Orphans' Court, would have put it out at interest, or applied the interest to their maintenance. I do not find the doctrine of equity laid down with greater precision any where than in *Small v. Dee*, 2 *Salk.* 415, by Lord Chancellor Cowper: "If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of a year after the testator's death; but it seems a year shall be allowed, for so long the statute of distributions allows before the distribution be compellable, and so long shall the executors have, that it may appear whether there be any debts; but if the legatee be of full age, he shall only have interest from the time of his demand after the year, *for no time of payment being set, is is not payable but on demand*, and he shall not have interest but from the time of the demand; otherwise in the case of an

(Bitzer's Executor v. Hahn and Wife.)

infant, because no laches is imputable to him. But where a certain legacy is left payable at a day certain, it must be paid with interest from that day." This decision is recommended by its natural justice, and is an authority which never has been overruled.

This, in substance, was the answer of the court to the third proposition of the plaintiff in error, and the charge of the court generally was in the same spirit. The law was correctly laid down.

I cannot say I quite comprehend the point of the second assignment of error; the answer to the first, second, fourth, and sixth propositions.

The act of assembly does not require the court to file of record their charge to the jury, but only their opinion with their reasons for it. There are few judges who draw out in writing, and *verbatim*, their charges. This could not be done, unless they had prepared it previously to hearing the counsel, and had it ready before they heard any argument. Their notes are short heads of the charge. The filing the opinion is a substitution, and a most miserable one (I again take occasion to say) of the bill of exceptions, whose office is well known. The judge is required to instruct the jury, in a particular manner, by the counsel of one party, on a question of law. This question is stated in the bill, and his answer is only required, either that he did so instruct the jury, agreeably to the request, or that he refused so to do, and it then sets out how he did instruct them. The opinion here filed was, that the judge did instruct the jury as the plaintiff in error had requested, and surely of this he cannot complain. Credit must be given to it; it is a part of the record; it imports absolute verity, and we cannot try it, but by itself; we cannot say it was not the opinion delivered.

As to the third and fifth propositions, the answer of the court was quite right, and so clearly expressed that it could not be misunderstood by a jury that had a ray of intelligence. It was, that if the jury found means in the hands of the executor, funds applicable to the discharge of these legacies, interest was to be paid from that time until the grandchildren became of age, and that interest was recoverable from that time, when there were sufficient assets in their hands to pay the debts and legacies, which had priority in time of payment by the will, and was not confined to the time of a demand and giving a refunding bond. The jury were instructed to ascertain what available funds came into the executor's hands applicable to the payment of the legacies, and to charge him with interest from the time he had such means; and, take the whole will together, the state of the family and the state of the property, not a barren but a productive fund, the decree was such a one as a chancellor would have made, and such doctrine as it behooved the court to give to the jury. If the jury have erred in point of fact, if they have charged the executor with interest be-

(Bitzer's Executor v. Hahn and Wife.)

yond this measure, the remedy was by motion for a new trial, but this cannot be known and cannot be noticed here.

It was the duty of the executor not to let the money remain unemployed. It would have been a balance in his hands, and if his account had been settled at the proper time, the balance would have appeared on that settlement; and the fair presumption was, that he had used the money for his own purposes. I repeat what was said by the chief justice, in *Fox v. Wilcocks*, 1 *Einn.* 194:—"It is impossible to lay down rules, by which it may be ascertained whether the executor should pay interest, because every case must depend upon its own particular circumstances." Though the rules before laid down in general are applicable to the payment of interest on legacies, it seems to me that interest is to be paid in all cases of legacies, from the time at which the testator ordered them to be paid; and it is impossible to contend, that the executor is bound to pay before he is ordered, except under very particular circumstances, and perhaps the only instance in which a legacy bears interest before the time of payment, is that of an infant. In that instance, the court does not postpone the payment of interest until a year after the death of the parent; for the court considers the parent to be under an obligation to provide, not only a future, but a present maintenance, and therefore the court hold, that he could only have postponed the payment from the incapacity of the child to receive, but not to deprive him of the fruit of the legacy, which is his only maintenance, and which maintenance he would be bound to provide. Here the time is stated; the legacy was payable at twenty-one, before which time the legatee dies. If interest is payable, his executor shall have the interest immediately; if not, he must wait till the legatee would have been twenty-one. I think a wife would fall within the exception to a child, unless where a wife has some other provision, and that may make a difference in the case of a child. I do not say that a grandchild is always in the same case as a child yet my own opinion is, that if the will manifests that he put himself in the relation of a parent, it would be a departure from all principle to make a distinction. Here the legacy was a debt from the time it was given. There was a severance of these legacies from the residuary property, and they became the property of the legatees, subject to be divested on an event, which event never has happened.

Judgment affirmed.

[LANCASTER, (*adjourned sittings,*) NOVEMBER, 14, 1826.]

M'ELCAR *against* ELLIOT and others.

IN ERROR.

Whether a right to an island in the *Susquehanna*, could be acquired by settlement and improvement in the year 1749, *quære*?

If it could, *quære* whether such a title, without warrant or survey, is embraced by the 5th section of the act of the 26th of *March*, 1785, where the settler was in possession at the date of the act?

A deposition, proving a settlement and improvement on an island in the *Susquehanna*, by the persons under whom the plaintiff claims, in the year 1749, and a possession continued upwards of fifty years, accompanied by a warrant issued in the year 1760, and a survey returned in the year 1763 for the use of the late proprietaries, is admissible in evidence, against a defendant who shows no title; without having previously given evidence connecting the plaintiff with those by whom the settlement was made.

THE plaintiff in error, *Peter M'Elcar*, brought this ejectment in the District Court of *Dauphin* county, against the defendants in error, *William Elliot*, *John Cowper*, *John Holland*, *Robert Boner*, and *Thomas Duncan*, Esq., to recover possession of an island, containing about six hundred and seventy-seven acres, with the usual allowance, situate in the river *Susquehanna*, near the mouth of the *Juniata*.

On the trial, the plaintiff offered in evidence the deposition of *Robert Armstrong*, for the purpose of showing, that the plaintiff, or those under whom he claimed, settled on and improved the island named in the writ, in the fall of 1749 or the spring of 1750, and constantly resided thereon from that time till the year 1802, except when driven off by the savages in *Braddock's* war; that they built houses on the island, cleared farms, and made it the constant place of residence of themselves and their families; this evidence to be followed by showing a warrant from the proprietary land office of the 13th of *October*, 1760, and a survey thereon in the name of the proprietaries of *Pennsylvania*, on the 13th of *November*, 1760, of this island, returned into the land office *July* 12th, 1763, and there accepted.

The defendants objected to the evidence offered by the plaintiff, and, in support of their objection, read in evidence to the court, a number of papers, for the purpose of showing that by the usage of the land office, both in the time of the proprietaries and since their estates became vested in the commonwealth, islands in the rivers *Susquehanna*, *Schuylkill*, and *Delaware*, were never granted on the common office terms, and were never subject to any right of pre-emption derived from improvement or settlement.

The court was of opinion, that a right to an island in the *Susquehanna* might be acquired by settlement and improvement in the year 1749; but that the evidence offered, being of an improvement right in 1749 and continued to 1802, since which, the plain-

(M'Elear v. Elliot and others.)

tiff, and those under whom he claimed, had been out of possession, the right was lost by the negligence of the plaintiff to institute his action for more than seven years, and was therefore barred by the 5th section of the act of the 26th of March, 1785; and that the evidence offered, being of facts, which, if received, would not constitute a title in the plaintiff, or give him a right of entry, ought to be rejected.

To this opinion, the counsel for the plaintiff tendered a bill of exceptions.

The deposition rejected by the court, was, in substance, as follows:—

The deponent first saw the island in dispute, in the year 1750, when *Francis Baskin*, *Joseph Thornton*, and *John Clark* were living, and had improvements on it. These persons lived on their improvements until after *Braddock's* defeat, in 1755, when they were driven off by the *Indians*. In the autumn of the year 1760, *Francis Baskin*, his son-in-law, *Alexander Stein*, and *George Clark*, lived on the mainland in the neighbourhood of the island, and worked on it; and in the spring of 1761 they moved their families, and resided on it. In the spring of 1766, the deponent saw *Patrick M'Elear*, deceased, living on *Joseph Thornton's* improvement, where he continued to reside until the time of his death. In April, 1766, *Michael Hawen*, son-in-law of *Patrick M'Elear*, lived on the island, between *Clark's* and *Stein's* places. *Patrick M'Elear* purchased *Thornton's* improvement, and also the claim of *James Baskin*, (brother of *Francis*,) who had a bare claim without having made any improvement. *Francis Baskin* and *George Clark* both lived on the island to the time of their death. *Francis Baskin* had two sons, *William* and *George*, to whom he left his improvement, they paying their sisters their portions. *William* had the upper part, and *George* the lower. *William* paid his sisters their portions. After the revolution, *George Baskin* went to the western country, and *Cornelius Atkinson* moved into his house, (the house in which *George Baskin* had lived after his father's death.) *William Baskin* lived in his father's old house on the island until Mr. *Duncan*, one of the defendants, bought. The deponent did not mention of whom Mr. *Duncan* bought, nor what he bought. Neither did he know in what year *William Baskin* left the island; but he knew that it was after the year 1800, when he moved off, and gave possession to Mr. *Duncan*, who put a tenant there. The deponent said, that two of the *M'Elears* (of whom, he thinks, *Thomas* was one, but does not know which of them was the other,) moved away with *Baskin*; but being asked whether they delivered possession to Mr. *Duncan*, he answered, that “he could not tell,—he was not present,—they all moved off together.

The cause was twice argued in this court, first, on the 16th of May, 1825, and again on the 7th of November, 1826.

(M'Elear v. Elliot and others.)

J. Fisher and *Douglass*, for the plaintiff in error, made three points:—

1. That the deposition of *Robert Armstrong* ought to have been received in evidence.

2. That the plaintiff was not barred by the 5th section of the act of the 26th of *March*, 1785

3. That the plaintiff ought to have been permitted to prove his possession of fifty-three years.

1. The opinion of the court below was, that in the year 1749, islands might be acquired by improvement. To this the plaintiff assented, and, no exception having been taken, the point is not before this court. It is not, however, difficult to show, that this opinion was correct. The custom of the land office, which the defendants endeavoured to prove, did not, according to the evidence produced, go further back than the year 1760, at which period the proprietaries issued their warrant for the survey of all unappropriated islands for their use. But the title under which the plaintiff claims, commenced as early as the year 1749, before this description of property had been separated from the general mass of the proprietary estate, and was therefore founded in as strong an equity as any other title originating in settlement and improvement. Evidence has been received of an improvement even within the reputed bounds of the manor of *Springettsbury*. *Lessee of Bonnet v. Devebaugh*, 3 Binn. 188. If the cause should go back to another jury, it will be easy to show, that islands were, during the period alluded to, taken up by common warrants. There never has been a direct decision of this court upon the point, though there are *dicta* of the judges, that islands are not the subjects of settlement rights.

But although the court was right in this opinion, it erred in the rejection of the deposition of *Robert Armstrong*, under the idea that the plaintiff's title was barred by the 5th section of the act of the 26th of *March*, 1785, 2 Sm. L. 299. It was not offered merely to prove a title by improvement. The plaintiff was not called upon to state with what view he offered it, nor was it offered for any particular purpose, or to establish any particular point. If, therefore, it was evidence for any purpose, it ought to have been received. It contained a great variety of matters, the decision of which, and the inferences to be drawn from them, exclusively belonged to the jury; and the court, by deciding upon the facts to which they related, and giving their opinion upon their own decision of what they ought not to have interfered with, withdrew the case from the jury altogether. Whether the plaintiff, or those under whom he claimed, was in possession at any time within seven years, prior to the institution of the suit, was a fact, which the jury, and not the court, ought to have decided. If the evidence offered and rejected, was not alone sufficient to entitle the plaintiff to recover, it was his first step towards showing title, which he was prepared to

(M'Elear v. Elliot and others.)

follow up with other evidence. The evidence offered, was the deposition of *Armstrong* and the proprietary warrant and survey; but the offer of these, did not preclude the plaintiff from offering other evidence. He might have shown a title derived from the proprietaries after the return of their survey; or, if there was no direct proof of a conveyance, the jury, after so long a possession, both before and after the survey, might have inferred a grant. How far the evidence conduces to the proof of a fact, the jury exclusively are to decide, and the only mode of withdrawing the decision from them, is by a demurrer to the evidence. The operation of the act of limitations must always arise upon facts, which must be found by the jury or agreed upon by the parties, and no court in *Pennsylvania* ever undertook to decide whether a party was barred, without submitting the facts to the jury; nor is there any precedent of the court stopping the course of the plaintiff's evidence, in order to let in evidence on the part of the defendant, for the purpose of showing that the evidence the plaintiff was about to offer, was improper. Whether, therefore, the deposition be viewed by itself, or in connexion with other evidence which the plaintiff might have given, the conclusion cannot be avoided, that the court usurped the province of the jury in refusing to permit it to be given in evidence *Vaughan v. Blanchard*, 4 Dall. 135. *Morris v. Duane*, 1 Binn. 92, (note.) *Richardson v. Stewart's Lessee*, 4 Binn. 202. *Howard's Lessee v. Pollock*, 1 Yeates, 512. *Bond's Lessee v. Fitz Randolph*, 2 Yeates, 228. *Mobley's Lessee v. Oeker*, 3 Yeates, 200. *Holmes v. Keitlinger*, 4 Yeates, 533. 4 Yeates, 541, (notes.) *Jones v. Wildes*, 8 Serg. & Rawle, 150. *Brown v. Campbell*, 1 Serg. & Rawle, 178. *Hib. Turnpike Co. v. Henderson*, 8 Serg. & Rawle, 223. *Stahle v. Spohn*, 8 Serg. & Rawle, 323. *Richter v. Selin*, 8 Serg. & Rawle, 437, 438. *Gordon v. Little*, 8 Serg. & Rawle, 554, 566. *Irish v. Smith*, 8 Serg. & Rawle, 581. 2 Tidd, 785. *Crotzer v. Russell*, 9 Serg. & Rawle, 81. *Zerger v. Sailer*, 6 Binn. 27. *Gemberling v. Meyer*, 2 Yeates, 341. *Magen's Lessee v. Smith*, 4 Binn. 75. *Garwood v. Dennis*, 4 Binn. 336. *Biddle's Lessee v. Dougal*, 5 Binn. 150. *Penrose v. Griffith*, 4 Binn. 239. *Sigfried v. Levan*, 6 Serg. & Rawle, 312. *Hershey v. Hershey*, 8 Serg. & Rawle, 334.

2. But, supposing that the court had a right to determine the facts, they erred in their construction of the 5th section of the act of the 26th of March, 1785, which does not apply to persons having imperfect rights, who were *in possession* at the time of its enactment. That section declares, that no person or persons who *now* hath or have any *claim to the possession* of any land, &c., founded upon any prior warrant, whereon no survey hath been made, or in consequence of any prior settlement, improvement, or occupation, without any other title, shall hereafter enter or bring any action for the recovery thereof, unless he, she, or they, or his,

(M'Elear v. Elliot and others.)

her, or their ancestors or predecessors, have had the quiet and peaceable possession of the same within seven years next before such entry, or bringing such action. *Claims existing at the time of the passage of the act*, are alone embraced by its provisions, and the true legal definition of a *claim* excludes the case of the plaintiff from the operation of this statute. A claim is defined, in 1 *Jacobs' Law Dictionary*, 470, to be a challenge of any *thing out of a man's possession*. But the plaintiff derives his title under persons who were in possession when the act was passed, and therefore cannot, with any propriety, be said to have had a *claim* to the possession of land, which they were then actually enjoying. In all the cases decided under this act of assembly, the party was out of possession at its date. Besides, the plaintiff did not found his right to recover, upon settlement and improvement only. He claimed also under the warrant and survey made for the proprietaries, which he contended enured to his own use, having been in possession long before the date of the warrant; and the 5th section of the act in question, does not apply to cases in which the party has *any other title*, than those therein specified. *Gilday v. Watson*, 5 *Serg. & Rawle*, 274. *Brice v. Curran*, 3 *Yeates*, 403. *Sturgeon's Lessee v. Waugh*, 2 *Yeates*, 476. *Bell's Lessee v. Levers*, 3 *Yeates*, 26. *Elliot v. Bonnet*, 3 *Yeates*, 287. *Burd v. Dansdale's Lessee*, 2 *Binn.* 89. *Hunter v. Meason*, 4 *Yeates*, 107. *Mickle v. Lucas*, 10 *Serg. & Rawle*, 293. *Gonzalus v. Hoover*, 6 *Serg. & Rawle*, 124. *Deal v. M'Cormick*, 3 *Serg. & Rawle*, 345. *Penn v. Klyne*, 4 *Dall.* 402.

3. The plaintiffs ought to have been permitted to prove a possession of fifty-three years, which was sufficient to warrant a presumption of title. Such presumptions have often been made after much shorter periods. *Galloway's Lessee v. Ogle*, 2 *Binn.* 471. *Stoolfoos v. Jenkins*, 8 *Serg. & Rawle*, 176. *Cherry v. Robinson*, 1 *Yeates*, 522. *Lowrey v. Gibson*, 2 *Yeates*, 81. *Crunkelton's Lessee v. Evert*, 3 *Yeates*, 570. *M'Cullough v. Wallace*, 8 *Serg. & Rawle*, 181. *Jackson v. Vosburg*, 7 *Johns.* 188. *Jackson v. M'Call*, 10 *Johns.* 380. 1 *Dall.* 68. *Jackson v. Hogeboom*, 11 *Johns.* 164. *Platt v. Root*, 15 *Johns.* 219. *Jackson v. Lunn*, 3 *Johns. Cas.* 114. *Woods v. Lane*, 2 *Serg. & Rawle*, 53. *Pedrick v. Searle*, 5 *Serg. & Rawle*, 240. *Cowp.* 215. *Kelly v. Southern*, 2 *Harr. & M'Hen.* 138. *Duer v. Boyd*, 1 *Serg. & Rawle*, 203. *Mathers v. Trinity Church*, 3 *Serg. & Rawle*, 509. *Kingston v. Lesley*, 10 *Serg. & Rawle*, 383.

G. Fisher and Elder, for the defendants in error.

The plaintiff was called upon to disclose his title, and he did so. He offered nothing but the deposition of *Armstrong*, and the warrant and survey for the use of the late proprietaries. The deposition was offered to prove a right by settlement and improvement; and where a party offers evidence for a particular purpose, he shall be held to that purpose in a court of error. *Wolverton v. Hurt*,

(M'Elear v. Elliot and others.)

7 *Serg. & Rawle*, 276. *Gordon v. Moore's Lessee*, 5 *Binn.* 138. *Richardson v. Stewart*, 4 *Binn.* 198. *Porter's Executors v. Neff*, 11 *Serg. & Rawle*, 219. The title set up by the plaintiff was found to be defective upon his own evidence, and therefore objected to, as irrelevant. It is for the court to decide on the competency of evidence, and if no good title was shown, admitting every thing stated in the deposition to be true, the court was right to reject it. Even supposing, therefore, that the judge was wrong in his opinion upon the act of limitations, yet if the deposition was inadmissible upon other grounds, the judgment cannot be reversed; for however bad the reasons for a decision may be, yet if the decision itself be right, the judgment must stand. *Deal v. M'Corkle*, 3 *Serg. & Rawle*, 347. The question, then, before this court is, whether an improvement gives title to an island in the *Susquehanna*? The law is perfectly clear, that it does not. No instance can be found of an island sold either by the proprietaries or by the commonwealth, except by special contract, and always at a higher price than the common office terms. The usage of pre-emption rights never extended to this description of property. Claiming, therefore, under those who entered as trespassers, the plaintiff can never acquire an equity. That islands were not open to acquisition in the ordinary way, like other lands, is not only proved by the usage of the land office, proved by the papers read in evidence, but by a long course of legislation and judicial opinion. On the 13th of *October*, 1760, a warrant issued to survey the unappropriated islands in the *Susquehanna*, *Delaware*, &c., and to make returns of them for the proprietaries. In pursuance of this warrant, a survey was made of the island in dispute on the 13th of *November* following, which was returned and accepted on the 12th of *July*, 1763. It became part of the private estate of the late proprietaries, and was secured to them by the act of the 27th of *November*, 1779, 1 *Sm. L.* 479, which vested in the commonwealth the estates of the proprietaries, saving to them their tenths or manors, duly surveyed and returned into the land office on or before the 4th of *July*, 1776. After the revolution, the same policy which the late proprietaries had adopted in relation to islands, was continued by the commonwealth. They were never granted on the common terms. In the act for establishing a land office, of the 9th of *April*, 1781, *Purd. Dig.* 470, and its supplement of the 25th of *June*, the same year, (*Purd. Dig.* 472,) islands are not mentioned. The 13th section of the act of *April*, 1785, 2 *Sm. L.* 317, expressly excepts islands from the ordinary terms of grant, and directs that they shall be sold by the special order of the president and council, by public auction. The act of the 6th of *March*, 1793, 3 *Sm. L.* 93, "directing the sale of certain islands in the *Susquehanna*," points out the mode of sale, and gives two years to settlers to purchase, if they desire to do so. The act of the 27th of *January*, 1806, 4 *Sm. L.* 268, likewise makes special provision

(M'Elear v. Elliot and others.)

for the sale of certain unappropriated islands in the *Delaware*, *Ohio*, and *Allegheny*. The opinions of the judges of this court fully support the argument deduced from legislative acts, and general opinion. In *Hunter v. Howard*, 10 *Serg. & Rawle*, 243, an ejectment for an island in the river *Allegheny*, DUNCAN, J., in delivering the opinion of the court, says, that islands were never subject to the common office terms. And, in a more recent case, *Shrunk v. The Schuylkill Navigation Company*,* in which the opinion of the court was delivered by TILGHMAN, C. J., it is declared, that islands have never been open to applicants on the usual terms of office. The foundation of title by settlement is, that the proprietaries held out such titles to the people, but the offer never extended to islands. Admitting, therefore, that the plaintiff was the son of *Patrick M'Elear*, the former settler, as to which however the deposition is silent, he can derive no equity from the settlement, because he claims under a mere trespasser.

Another bar to the plaintiff's recovery is, that he claims under a violation of the law, which forbids a settlement on lands not purchased of the *Indians*. His evidence goes to show, that there was an improvement on the island, which must have been made prior to the date of the *Indian* purchase, in which it was included. It appeared, that in 1750 there were peach trees in bloom on this improvement, which must have been planted prior to the 22d of *August*, 1749, the date of the purchase. It has been repeatedly decided, that no evidence can be received of a settlement on land not purchased from the *Indians*. *Sherer v. M'Furland*, 2 *Yeates*, 224. *Drinker v. Hunter*, 2 *Yeates*, 129. *Kyle v. White*, 1 *Binn.* 248. *White v. Kyle*, 1 *Serg. & Rawle*, 515. *Brice v. Curran*, 3 *Yeates*, 403. *Plumsted v. Rudebagh*, 1 *Yeates*, 502. An act of assembly was necessary to confirm the title of certain persons holding *Biles's* island, situate in the river *Delaware*, about a mile below the falls, purchased by the *Biles* family of the *Indians*, in the year 1680. *Act of the 1st of February*, 1808.

The possession relied upon by the plaintiff, was not of a character from which a presumption of title could arise. No period short of that prescribed by the act of limitations, will raise the presumption of a grant, founded upon the lapse of time only. *Reikhart v. Williams*, 7 *Wheat.* 109. 2 *Conn. Rep.* 207. 2 *Hen. & Munf.* 376, 379, 380. *Bridges v. Duke of Chandos*, 2 *Burr.* 1073. In the present instance, the act of limitations would not attach before the 26th of *March*, 1803; but Mr. *Duncan* came into possession in the year 1802.

As his first step, the plaintiff ought to have shown that the title was out of the commonwealth. Having done this, proof of seisin in those under whom he claimed would have been sufficient against a party who showed no title. A naked possession is a good title, until

* *Ante*, page 71.

(M'Elear v. Elliot and others.)

some one shows a better right. But if it be voluntarily abandoned, it cannot be recovered in ejectment. This is precisely the present case. The deposition states, that Mr. *Duncan* purchased the island; that *Baskins* moved away, and gave Mr. *Duncan* possession, and that the *M'Elears* moved away at the same time; from which it is clear, that the *M'Elears* also gave up the possession to Mr. *Duncan*. The authorities are conclusive, that, under such circumstances, the possession cannot be recovered from him. *Jackson v. Hazen*, 2 Johns. 22. *Jackson v. Harder*, 4 Johns. 210. *Smith v. Lorillard*, 10 Johns. 356. *Espy's Executors v. Lane*, 2 Serg. & Rawle, 53. *Jackson v. Rightmire*, 16 Johns. 324. 2 Conn. Rep. 207. *Penn v. Klyne*, 4 Dall. 409. *Healy v. Mouel*, 5 Serg. & Rawle, 185. *Morris v. Thomas*, 5 Binn. 78. *Hawk v. Troup*, Lancaster, May, 1826. *Hassinger v. Spayd*, Sunbury, July, 1826.

The plaintiff, far from deriving an advantage from the warrant and survey for the use of the proprietaries, presents, by his own evidence, an additional obstacle to his recovery. He claims adversely to this title, and shows a title in a third person, under which the defendants may protect themselves. *Act of the 21st of March*, 1806. *Act of the 13th of April*, 1807, *Purd. Dig.* 145. Besides, the defendants asserted title under the late proprietaries, which was not denied.

But if the plaintiff had a title by improvement, and moved off, and remained out of possession more than seven years, he is barred by the 5th section of the act of the 26th of *March*, 1785, which we contend extends, as well to those who were then in possession, as to others. The spirit of all the decisions on this point is, that where a man had a claim by warrant only, or by settlement only, prior to the passage of that act, he could not recover in ejectment, unless he had been in possession within seven years before the commencement of the suit. Whether he was in possession at the date of the act or not, is immaterial, provided he was not in possession within the period prescribed. The evidence shows no other than a title by settlement, originating before the passage of the act of 1785, and the court can presume no other; and this title was abandoned to the defendants in the year 1802. *Burd's Lessee v. Dansdale*, 2 Binn. 80. *Smith v. Brown*, 1 Yeates, 517. 3 Yeates, 269. *Wallace v. Dickey*, 3 Yeates, 283. *Ewing v. Barton*, 2 Sm. L. 186, 187. 5 Serg. & Rawle, 184, 186. *Jackson v. Hobby*, 20 Johns. 362.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an ejectment for an island in the river *Susquehanna*, containing about six hundred and seventy-seven acres, with the usual allowance, situate near the mouth of the *Juniata*. The cause came to trial in the District Court for the county of *Dauphin*, when certain evidence being offered by

(M'Elear v. Elliot and others.)

the plaintiff, it was objected to by the defendants, and rejected by the court; whereupon the counsel for the plaintiff took an exception, which is now the subject of consideration.

The evidence offered by the plaintiff, was the deposition of *Robert Armstrong*, taken under a rule of court, and to the following effect. [His Honour here stated the substance of the deposition.] This is the substance of *Armstrong's* deposition, from which it remains doubtful, of whom, and how much Mr. *Duncan* purchased, and whether he received possession from the *M'Elear* family. *Peter M'Elear* (the plaintiff,) is not mentioned in the deposition, so that it could not appear, without further evidence, how he stood related to *Patrick M'Elear*, deceased. The plaintiff also offered in evidence a warrant, dated the 13th of *October*, 1760, to survey this, and other islands in the *Susquehanna*, for the use of the late proprietaries of *Pennsylvania*, and a survey in pursuance thereof, the 13th of *November*, 1760, which was returned, and accepted, in the office of the surveyor general, the 12th of *July*, 1763. When the counsel for the defendants objected to the plaintiff's evidence, they produced and read to the court a number of papers, tending to show the custom of the land office, both in the time of the proprietaries, and since their estates became vested in the commonwealth; from which they inferred, that islands were never granted on the common office terms, and were never subject to any right of pre-emption, to be acquired by improvement or settlement. The District Court was of opinion, that a right to an island in the *Susquehanna*, might be acquired by settlement and improvement in the year 1749. Nevertheless, they rejected the plaintiff's evidence, on the ground of his being barred of his action by the act of limitation, (26th of *March*, 1785, sect. 5.) In this opinion, it was assumed, that the evidence of the plaintiff showed no title except by improvement and settlement, without warrant or survey, for, if he had any other title, it is evident, that he was not barred by the 5th section of the act of limitation. The plaintiff took no exception to the opinion, that the right to an island might be acquired by improvement and settlement in the year 1749, because it was in his favour. It might be thought, that, under these circumstances, this court would be going out of their way, should they now express an opinion on that point. They therefore abstain from it, and desire it to be understood, that no inference, one way or the other, is to be drawn from their silence. Neither shall we give an opinion what the law would be, under the act of limitation, (section 5,) if the evidence offered by the plaintiff disclosed no other title than by improvement and settlement, without warrant or survey; because that is not the case. It is to be remarked, that when the plaintiff offered his evidence, he did not say, either that it was for no other purpose than to prove a title by improvement and settlement, or that he intended to offer no other evidence. The defendants might have called on him to

(M'Elear v. Elliot and others.)

declare the purpose for which the evidence was offered; but they did not. The question is, therefore, whether the evidence was not at least one step towards a title other than by improvement and settlement. We will suppose, merely for the sake of the argument, that *Patrick M'Elear* could legally acquire no title against the proprietaries by settlement, (which is stating the case as strongly as possible against the plaintiff,) it does not follow, that a possession of upwards of fifty years, continued from father to son, was not evidence of title sufficient to recover against one who showed *no title*. Suppose the evidence had been given, with additional evidence connecting the plaintiff's possession with that of *Patrick M'Elear*, and the defendants had demurred to it; or suppose the defendants, without giving any evidence of their own, had gone before the jury on the evidence of the plaintiff, how would they have stood? By the warrant and survey, this island had been separated from the general mass of property held by the proprietaries, and appropriated to their particular use. And being thus appropriated, it was excepted from the general proprietary estate, which was vested in the commonwealth by virtue of the act of the 27th of *November, 1779*, and remained the property of the proprietaries. There was, then, a period of thirty-nine years, between the return of the survey in 1763, and the entry of *Mr. Duncan*, when he received possession from *Baskin* in 1802, during the whole of which, possession had been held by *Patrick M'Elear*, deceased, or those from whom he received possession, or those claiming under him. Although the deposition of *Armstrong* did not state that the plaintiff was of the family of *Patrick M'Elear*, yet the plaintiff might have proved that fact by other evidence, especially as it appears by the bill of exceptions, that he claimed under an uninterrupted possession from the first settler to himself. I have said, that *Mr. Duncan* received possession from *Baskin*, because it is expressly said so in *Armstrong's* deposition. He may, perhaps, have received possession from some, or all, of the *M'Elear* family also, but the deposition does not say so, and the court cannot infer it. It is a very material fact, which none but the jury could decide. Now, in a contest between the plaintiff and strangers, *without title*, (for so the defendants must be considered, having shown no title except the possession received from *William Baskin*, which could not affect the plaintiff,) could the jury do otherwise than presume, that the plaintiff's possession was by permission of the late proprietaries and their heirs; and, consequently, his title good against all but them, or those who claimed lawfully under them? In *Woods, &c. v. Lane, 2 Serg. & Rawle, 53*, it was the opinion of this court, that a *bare possession* was good title against one who showed no title. The case would have been very different, if it had appeared, either that the *M'Elears* had abandoned their possession, or given it up to *Mr. Duncan*, or that *Mr. Duncan* had acquired title from the late proprietaries.

(M'Elear v. Elliot and others.)

A title thus acquired would have taken away all presumption of title in the plaintiff, by virtue of a license from the owners of the soil; and, as to a presumption of a *grant in fee simple* (as contended by the counsel for the plaintiff,) there was no ground for it, because such a presumption, when resting on time only, can never be raised, on less time than that prescribed by the act of limitation. But whatever the probability may be, of a conveyance from the proprietaries to Mr. *Duncan*, we see nothing of it on the record, and therefore cannot suppose that it exists. Our present duty is confined to a determination, not whether the evidence offered proved a complete title, but whether it ought not to have been admitted. I am of opinion that it ought, and therefore the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

END OF MAY TERM, 1826—LANCASTER DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT—JUNE TERM, 1826.

[SUNBURY, JUNE 21, 1826.]

BOMBAY, Administrator of BOWER, and another, *against*
BOYER.

IN ERROR.

The time during which a judgment continues to be a lien upon lands, under the act of the 4th of *April*, 1798, is to be determined by the record alone, without regard to any private agreement for a stay of execution, not appearing upon the record.

It is not against equity, that a purchaser should insist on counting the five years from the date of the judgment, although he was informed before he made the purchase, that by the condition of the bond, or a private agreement of the parties, execution could not be issued on the judgment, until a time less than five years before his purchase.

WRIT of error to the Court of Common Pleas of *Northumberland* county, in a *scire facias post annum et diem*, &c., issued by *Jacob K. Boyer*, the plaintiff below, against *Jacob Bombay* administrator of *Jacob Bower*, deceased, and *Benjamin Kline*, co-defendants below.

It appeared, that on the 23d of *December*, 1808, judgment was entered in the Court of Common Pleas of *Northumberland* county for *Jacob K. Boyer*, the plaintiff below, against *Jacob Bower*, by confession, for the sum of one thousand three hundred pounds. No declaration or statement was filed; so that nothing appeared on the record but a judgment in an action of debt. The truth, however, was, that the one thousand three hundred pounds for which the judgment was confessed, was the penalty of a bond, conditioned for the payment of six hundred and fifty pounds on

(Bombay, Administrator of Bower, and another, v. Boyer.)

the 1st of *May*, 1809, but intended as a security for the payment of several bonds from a certain *Peter Fisher* to *Jacob Bower*, dated the 9th of *July*, 1807, the first of which was payable the 1st of *May*, 1812, and the others by annual instalments. These bonds were assigned by *Bower* to *Jacob K. Boyer*, the plaintiff. *Benjamin Kline*, the defendant below, purchased on the 12th of *April*, 1814, the land of *Jacob Bower*, which belonged to him at the time of the entry of the plaintiff's judgment, and was consequently bound by the said judgment, and was informed, before he made the purchase, of the nature of the bond on which the judgment was entered. More than five years elapsed from the date of the judgment, to the time of issuing the *scire facias* in this suit, but five years had not elapsed from the time of payment of the bonds on which the plaintiff's judgment was entered to the issuing of the said *scire facias*. Neither had five years elapsed from the time of payment of the bonds from *Fisher* to *Bower*, to the issuing of the said *scire facias*. On these facts the President of the Court of Common Pleas gave his opinion, that the lien of the plaintiff's judgment continued, from the time of the payment of the bond on which the judgment was entered, viz. the 1st of *May*, 1809, for five years thence next ensuing, because no execution could be taken out before the time of payment. And he also gave his opinion, that if *Kline* purchased, with notice of the real nature and intent of the bond on which the plaintiff's judgment was entered, he was bound in equity not to take advantage of the lapse of more than five years from the date of the said judgment to the issuing of the *scire facias* in this suit.

Hepburn and *Bellas* for the plaintiffs in error. The opinion of the court below, that if *Kline* when he purchased knew of the nature of *Boyer's* judgment against *Bower*, the lien continued, is in direct opposition to the act of the 4th of *April*, 1798, *Purd. Dig.* 391, which declares in express terms, that no judgment shall continue a lien on lands longer than five years from the first return day of the term of which such judgment may be entered. This court has gone far enough in deciding, that where it appears from the record that execution cannot immediately issue, the five years are to be computed from the expiration of the *cesset*. This doctrine may do no harm, because the records are open to all, but to make any thing but the record notice of a judgment to affect purchasers, and to give effect to private arrangements, would totally destroy the security of titles. In the case of *The Bank of North America v. Fitzsimons*, 3 Binn. 343, though the bank had express notice of the judgment of the *Hibberts*, yet it was held that the land was discharged of the lien. The act of 1798 is in the nature of an act of limitations, and was so considered by the Chief Justice in the case just cited; and, in reference to acts of limitations, notice to a purchaser does not avail. They cited, also, *Dunlop v. Speer*, 3 Binn. 169. 1 Str. 301. Salk. 322.

(Bombay, Administrator of Bower, and another, v. Boyer.)

Greenough and *Greer*, for the defendant in error. In the case of *Pennock v. Hart*, 8 *Serg. & Rawle*, 377, the court departed from the letter of the act of 1798, and gave it an equitable construction, by computing the five years from the time the stay of execution appearing on the record expired. The spirit of that decision embraces this case, for actual notice is at least equal to constructive notice, and if the fact was *known* to the purchaser, he is as much bound by it as if it appeared on the record. A purchaser with notice of an undocketed judgment, is bound by it. 2 *Eq. Ab.* 684, *pl.* 7. And a person who by standing by enables another to commit a fraud, is himself guilty of fraud. 1 *Madd. Ch.* 322. 1 *Cowp.* 434. When, therefore, *Kline* purchased with full notice of the nature of the judgment, he tacitly agreed to be bound by its terms, and to seek now to be relieved from those terms, is against conscience.

The opinion of the court was delivered by

TILGHMAN, C. J. This case depends on the act of the 4th of *April*, 1798, by which the lien of judgments on lands is limited to five years. The facts are as follows: [The Chief Justice here stated the facts, and the opinion of the court below.] In both these opinions of the Court of Common Pleas, I think there was error.

1. The act of the 4th of *April*, 1798, is entitled, "An act limiting the time during which judgments shall be a lien on real estates," &c., and, in the case of *The Bank of North America v. Fitzsimons*, 3 *Binn.* 358, it is considered as of the nature of an act of limitations. Its words are clear and positive, that "no judgment shall continue a lien on the real estate of the person against whom such judgment shall be entered, during a longer period than five years from the first return day of the term of which such judgment may be entered," unless revived in the manner prescribed in that act. It was decided by this court, in *Pennock, &c. v. Hart*, 8 *Serg. & Rawle*, 369, that where the judgment was entered with a stay of execution, *on record*, the five years should run only from the time when the stay of execution expired. But it was not our opinion, that any regard should be paid to a stay of execution agreed on by the parties, but *not appearing on record*. Such a construction would be a departure both from the letter and spirit of the law. It has always been the policy of our law, to facilitate the sale and transfer of real estate, to which liens were found to be a considerable impediment. In pursuance of this policy, the act in question was made, to which we gave a liberal construction in *The Bank of North America v. Fitzsimons*, by deciding that judgment creditors stand upon the same footing as purchasers. The record is to be looked to, and the commencement of the five years determined from that alone. Now, in the case before us, all that appeared on the record, was the entry of the judgment on a

(Bombay, Administrator of Bower, and another, v. Boyer.)

certain day, without any mention of the condition of the bond. Its real intent was a secret, known only to the parties. If people will hang out false colours, they must take the consequences. Between themselves, it is all very fair that their agreement, however secret, should be carried into execution. But it would be most unreasonable, to involve strangers in the difficulty and peril of searching beyond the record.*

2. Neither is it against equity, that a purchaser should insist on counting the five years from the date of the judgment, although he was informed, before he made the purchase, that by the condition of the bond, or a private agreement of the parties, execution could not be issued on the judgment until a time less than five years before his purchase. His conscience was not burthened with circumstances of that kind. He saw, that by the plain enactment of the law, the land of *Bower* was discharged from the lien of the plaintiff's judgment. He was no way concerned in the transactions of the parties to that judgment. He had received no consideration, nor entered into any engagement with either of them, which should preclude him from taking advantage of the law. The case is not similar to those which have arisen on the registering acts, where it has been decided, that although the statute declares that a deed shall be of no effect, unless registered within a certain time, yet equity will support it, against a subsequent purchaser who had notice of the unregistered deed. It was thought to be against good conscience, thus voluntarily to step in and assist the vendor in defrauding the careless vendee, who had neglected to put his deed on record. In the present case, the plaintiff had paid no money for his lien. It was a legal advantage, which he had gained by compulsion. The law gave him the lien, and the law deprived him of it. A subsequent purchaser, therefore, might with good conscience insist on the law. I will add, that this liberty which courts of chancery have taken with statutes, in contradicting, and almost annihilating their provisions, has introduced great uncertainty, and would not be carried so far, since our experience of its inconvenience, if our steps could be retraced, without shaking the foundations of property. But repeated decisions become a rule of property, which cannot be departed from, without doing a greater mischief than that which it is intended to remedy. As respects the act of assembly which we are now to construe, we are fettered with no decisions which militate with its provisions. It is best, therefore, to adhere to a construction which shall effectuate its plain intent; and not say, that it is against conscience for a purchaser to govern himself by the law as he sees it written. I am of opinion that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

* On this point, see *Black v. Dobson*, 11 Serg. & Rawle, 94.

[SUNBURY, JUNE 21, 1826.]

The COMMONWEALTH, for the use of GURNEY'S Exrs.,
against ALEXANDER and others.

IN ERROR.

A purchaser at sheriff's sale under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly subject to such prior judgment.

Where, therefore, money is in the hands of the sheriff, arising from the sale of land under a judgment obtained against the present owner, creditors who have liens upon the land, by virtue of judgments obtained against the former owner, are entitled to payment out of this fund; and if the sheriff, instead of satisfying such liens, pays over the balance of the purchase money to the defendant in the execution, the previous judgment creditors may recover from him the amount of their respective liens.

Whether the judgment creditor had not lost his lien, in consequence of his attorney having permitted the misappropriation of another fund, out of which he was entitled to payment, properly left to the jury, under the facts and circumstances of the case.

WRIT of error to the Court of Common Pleas of *Centre* county.

In the court below, it was an action brought in the name of the commonwealth, for the use of the executors of *Francis Gurney*, against *William Alexander*, sheriff of the said county, and *Philip Benner* and *Isaac McKinny*, his sureties, upon the official bond of the former, and the facts set out in the assignment of breaches were these: On the 6th of *December*, 1813, a judgment for three thousand and seventy-eight dollars was entered in the Common Pleas of *Centre* county, in favour of the executors of *Francis Gurney*, against *William Patton*, who owned sundry tracts of land in the said county, with a stay of execution for two years. The lien of this judgment was kept alive by *scire facias*. After the date of the judgment, viz. on the 14th of *May*, 1814, *Patton* sold one tract of land to *Samuel Maxwell*, for a full and valuable consideration. When this sale was about to take place, *Thomas Burnside*, esq., who was attorney for *Francis Gurney* during his life, and for his executors after his death, was pressed for a release of the lien upon this land, which he refused to give, in consequence of which *Patton* gave to *Maxwell* a bond with two sureties, to indemnify him against the lien of the said judgment. *Samuel Maxwell* having become indebted, among others, to *G. and H. Fahnestock*, gave them a judgment of *April* Term, 1817, on which a *fieri facias* was issued, and the above mentioned tract of land purchased from *Patton*, levied upon, condemned, and sold. The sheriff executed a deed to the purchaser, and gave a receipt for the whole amount of the purchase money. This suit was brought to recover the amount of the judgment held by *Gurney's* executors against *William Patton*.

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

It further appeared, that *Philip Benner*, on the 26th of *August*, 1814, obtained a judgment for one thousand five hundred and fifty-six dollars and thirty-five cents, against *William Patton*, under which other real estate of *William Patton* was sold, by virtue of a *venditioni exponas*, returnable to *April Term*, 1815. The then sheriff, Mr. *Rankin*, executed a deed to the purchaser, gave a receipt for the whole of the purchase money, and after having paid a few judgments, took a receipt for the balance, amounting to nine hundred dollars, from the said *William Patton*. During the whole of this transaction, Mr. *Burnside*, who, though without a written power of attorney, was the agent of Mr. *Gurney*, and had the whole control and management of his affairs in the county, knew of the arrangement by which *Patton* was to give his receipt to the sheriff for the balance of the purchase money purporting to be in his hands, though nothing more than the costs was ever actually received by him. In this arrangement, Mr. *Burnside*, as agent, took no part, except that he was present and was consulted on the subject. He neither assented to it nor opposed it, but, as he stated in his examination, "permitted it to be done."

After the evidence was closed, which embraced various other matters, not necessary to be here stated, the President of the Court of Common Pleas (REED) delivered to the jury the following

CHARGE.—We are of opinion, in this case, that the plaintiffs are not entitled to recover. The controversy rests more upon principles of law, than any dispute about facts. The law we will endeavour to explain to you.

Taking the facts as set out in the assignment of breaches, endorsed on the plaintiffs' declaration, we think they would not entitle them to recover. It is admitted, on all hands, that the sale by *Patton* to *Maxwell* could not affect or impair the lien; but the first question is, Whether the plaintiffs have any other remedy than to proceed against the land as the property of *William Patton*, or, in other words, whether they can demand from the sheriff their claim out of the proceeds of the sale of the title of *Samuel Maxwell*?—And we are of opinion they cannot. The judgment against *Patton* did not disfranchise him as a freeholder. It did not in law operate as a disseisin; consequently, he had it in his power to sell the freehold, and to convey it to *Maxwell*, and *Maxwell* would hold it only subject to the incumbrance. It being, then, *Maxwell's* freehold, a levy and sale of it as *Maxwell's* property, would only transfer his title. Such sale could not operate on the title of *Patton*, for he had before parted with it, and it had become legally vested in *Maxwell*. It being exclusively *Maxwell's* property, and *Maxwell's* title that was sold, the proceeds would belong exclusively to *Maxwell* and to his creditors. The purchaser would stand precisely in the place of *Maxwell*, that is, he would have the title and the freehold, but subject to the previous incumbrance. To allow the plaintiffs to re-

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

cover, would manifestly be selling the estate of one man to pay the debt of another. It is no answer to say, that *Maxwell* purchased the estate liable to the incumbrance, because that incumbrance authorized the plaintiffs to proceed against the estate of *Patton*; which was bound by it; and it might be a materially different thing, whether they should have proceeded against *Patton* on this judgment, or against *Maxwell*. Their titles might be different, for *Maxwell* might have procured a patent, extended the improvements, or in various other ways, and at great expense, completed a defective title; and in this way the whole would go to the benefit of *Patton's* creditors, in preference to *Maxwell's*. If *Patton's* title had been sold, *Maxwell* might have had a chance of buying it in. If *Patton's* creditors can demand the money, they would be compellable to take whatever such sale would bring; for the rule, of necessity, must be reciprocal. The purchaser, under such circumstances, either buys the land subject to the incumbrance absolutely, or totally discharged from it. It cannot abide the option of any person. If it were otherwise, there would be no certainty in sheriff's sales, and no one could tell what price he had to pay, until after the sale, the creditors should choose to demand or not demand their claims out of the proceeds. It is indispensibly necessary to adopt a fixed and certain rule, either that the purchaser takes the land subject to the lien, or that he does not. To adopt the latter alternative would be in violation of all principle, and fraught with the most pernicious consequences. It would be putting the control of a man's lien into the hands of strangers, without his consent; for after a sale or two of the land, new creditors and new debtors are introduced, with whom the original parties had nothing to do.

It is supposed the defendant is responsible for the appropriation of monies on the sales of real estate, to the liens, according to their priority. If so, how can he ascertain liens against previous owners, in different names, and of which the record can furnish him with no notice? But this is reasoning only from the inexpediency of such a sale. I care more for the principles on which such sales are made. The sheriff sells all the right, title, and interest of a defendant, and a purchaser stands precisely in his place. And if the defendant held the legal estate liable to an outstanding incumbrance, it would seem to follow that the sheriff's vendee would hold in the same manner. If an ancestor was indebted, say by judgment, and either die intestate, or devise his land to his son, and that son should become indebted, and the land be sold on a judgment against him, I think it could hardly be pretended that the purchase money could be claimed by the creditors of the ancestor. And in what does that case differ in principle from the present? The whole estate of the defendant in the execution is sold, and the whole price is to be applied to liens against him, according to priority, and, if any balance, to be paid to himself.

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

If a person mortgage his property and remain in possession, he retains an equitable interest, which is the subject of levy and sale; and, if sold upon a subsequent judgment, nothing but the equity of redemption passes, and no part of the purchase money can be applied to the mortgage,—on the ground that the estate beyond the mortgage was sold, and the proceeds are to be applied to liens beyond the mortgage.

The sole principle of appropriation of monies raised by sales of real estate, is, that the court will not turn parties round to ask the process of the court, to raise money, when the money is actually in court. I therefore hold it to be a sound rule, that no one has a right to come into court and ask for a summary appropriation to himself, who is not entitled to the process of the court to raise the money. Therefore, upon sales on judgments in the Court of Common Pleas, the sheriff is not to go out of that court to look for liens. Mortgages on which no judgments have been rendered, recognizances in the Orphans' Court, legacies charged upon land, and all such incumbrances, are out of the sphere of summary appropriations, either by the sheriff or by the court; and, so far from the sheriff incurring any liability by the nonpayment of them, they would not be entitled to payment on a specific application to the court. I am perfectly aware of the difference of opinion that has existed on this subject, and I do hope that this case will be reviewed by the Supreme Court, in which the judges will be enabled to fix some principles that will render the practice more uniform. The purchase of the same estate, under the same circumstance, by the variance in practice in different counties, might cost the purchaser ten times the price in one over that in another.

Another point arises on the facts in this case. [His Honour here recapitulated the principal facts connected with Mr. *Burnside's* knowledge of the arrangement by which *William Patton* received the balance of the purchase money arising from the sale under *Benner's* judgment.]

I have only repeated a part of the evidence. The jury will remember it. Upon the facts, it is contended that the plaintiffs by their conduct, relinquished their lien, under which they now claim. It is an undoubted rule in equity, and in *Pennsylvania* the law is the same, that a creditor having two funds, one of which is *bona fide* sold for a valuable consideration by the defendant afterwards, when the first fund is presented to the creditor, and he refuses to use it, though sufficient, that he will not be permitted to resort to the second fund, to the prejudice of the intervening rights of the third person. So that if, in this case, by the sale under *Benner's* judgment, an ample fund was raised to pay off all antecedent incumbrances, as well as the judgment in question against *William Patton*; and the plaintiffs, by their agent, assented to that fund being paid over to *William Patton* himself, and did not claim it when they had the legal right; and, after the other fund had been

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

transferred *bona fide*, and for a full and valuable consideration to *Maxwell*, notwithstanding the stay of execution was not up at the time on the judgment which is the subject of this suit, we say that such facts would justify the jury in saying, that the plaintiffs have relinquished their lien as against *Samuel Maxwell*, on the equitable presumption, that that *had* been done which ought to have been done. If the plaintiffs omitted to assert their claim, when justice and fair dealing required them to do it, the law will not suffer them to assert it, when it is so unjust and injurious to the rights of third persons to do so.

In case of two or more judgments against land, and a sale by the sheriff on a younger one, for enough to discharge the whole, if the elder creditor should refuse to take his claim out of the proceeds, and suffer the sheriff to pay over the balance to the defendant, it would be a relinquishment of his lien as against the purchaser. Any capricious arrangements of that kind, to the direct injury of subsequent innocent creditors or purchasers, would be against equity.

The counsel for the plaintiffs excepted to the charge, and, at their request, a copy of it was filed by the court.

Potter and Burnside, for the plaintiffs in error, referred to the *Act of 1700*, *Purd. Dig.* 263. *Act of 1705*, *sect. 3, 6, 7*, *Purd. Dig.* 264. *Semple v. Burd*, 7 *Serg. & Rawle*, 285. *Morris v. Griffiths*, 1 *Yeates*, 189. *Nichols v. Posthewaite*, 2 *Dall.* 131. *Bank of North America v. Fitzsimons*, 3 *Binn.* 358. *Moliere v. Noe*, 4 *Dall.* 450. 2 *Binn.* 40. 6 *Johns. R.* 51, 53. 8 *Johns.* 361. 10 *Johns. R.* 515. 5 *Johns. Ch. R.* 239. *Whart. Dig.* 209, No. 43. *Young v. Taylor*, 2 *Binn.* 218.

Blanchard, for the defendants in error, cited *Cowden v. Brady*, 8 *Serg. & Rawle*, 513. *Gause v. Wiley*, 4 *Serg. & Rawle*, 539. *Griffith v. Chew*, 8 *Serg. & Rawle*, 28, 30, 34. 2 *Atk.* 246. 19 *Johns.* 492. *Govett v. Reed*, 4 *Yeates*, 461.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action on a sheriff's bond, and the breach assigned, is, that the sheriff, (*William Alexander*,) having received a sum of money proceeding from the sale of the land of *Samuel Maxwell*, by virtue of an execution on a judgment obtained against the said *Maxwell*, by *G. and H. Fahnestock*, out of which money the executors of *Francis Gurney* had a right to receive the amount of a judgment obtained by the said *Gurney* in his lifetime against *William Patton*, the said sheriff refused to pay them, but appropriated all the money in his hands to other purposes. The fact was, that the land of *Maxwell*, from the sale of which the money was raised, was the property of *Patton*, at the time when *Gurney's* judgment against him was entered, and was afterwards purchased by *Maxwell*. There was no question, but *Gurney's* judgment was a lien on this land; but the

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

President of the Court of Common Pleas, was of opinion, that on an execution against *Maxwell*, nothing but the rights of *Maxwell* could be sold, and therefore no part of the proceeds of that sale could be applied to any other purpose, than the discharge of judgments against *Maxwell*, and the surplus, if any, to be paid to *Maxwell* himself. In other words, that the purchaser at the sheriff's sale, took the land subject to *Gurney's* judgment against *Patton*. I cannot assent to this opinion, because the principle on which it is founded, would work the most ruinous injustice, in all cases where the purchaser at a sheriff's sale paid the full value of the land, and is, I think, contrary to ancient practice and express adjudication. It is a subject of very great importance, on which the opinions of lawyers have been discordant, and it is not my intention to enter further into it, at present, than is necessary to decide the question before us, which does not appear to me to be attended with any difficulty. I grant, that *Fahnestock's* execution against *Maxwell*, commanded the sheriff to sell the right of *Maxwell*, and no more. But what was the right of *Maxwell*? He had a right to the fee simple, subject to all liens by virtue of judgments, either against himself or those under whom he claimed. The question is, then, whether the court will let in creditors who had obtained judgments against *Patton*, under whom *Maxwell* claimed, to receive payment of their judgments out of the money raised on *Fahnestock's* execution? If the sheriff had sold the land, expressly subject to prior liens, the purchaser would have adapted his bid to the circumstances of the case,—he would not have bid the full value of the land, but its value, deducting the prior liens to which it was subject. But, if the sheriff sold without mention of prior liens, the purchaser would bid the full value, leaving it to the sheriff to make the legal appropriations of the purchase money. It is manifestly the interest of the debtor, that the purchaser should not be at the peril of satisfying prior incumbrances; because, under an embarrassment of that kind, the land would, in all probability, go off far below its value. And that, by long and general practice, the sheriff has taken on himself the appropriation of the money raised by the sale, and conveyed to the purchaser a title free from incumbrances, I have no doubt. In cases of difficulty, it has been usual to bring the money into court, and pray their direction as to the manner in which it is to be distributed. In the case of *The Bank of North America v. Fitzsimons*, 3 Binn. 358, it is said to have been “a practice of long standing in this state, when the sheriff sells land by virtue of an execution, to sell it for its full value, without regard to the lien of judgments, and to apply the purchase money to the discharge of these liens, according to their order.” And, in *Semple v. Burd*, 7 Serg. & Rawle, 290, the words of the court were, “that, on a sale by the sheriff, liens are paid according to their priority, without regard to their quality.” As to the objection against letting in

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

any person who was not a creditor of *Maxwell*, on a judgment and execution against *Maxwell*, it is answered by express authority. In *Nichols v. Posthwaite*; 2 *Dall.* 131, the case was, that A. devised land to B. charged with legacies. The land was sold on a judgment against B., and it was held, that the proceeds of the sale should applied, in the first place, to the discharge of the legacies;—and, on the same principle, the judgment creditors of the testator, had there been any, must also have been let in. The reason for letting in third persons in this summary way, is to avoid expense and circuitry of action. The prior judgment creditor is permitted to receive satisfaction out of a fund, upon which he could have come by suing out an execution for himself. If A. obtains judgment against B., who afterwards aliens to C., A. may levy on the land in the possession of C. without being put to a *scire facias* against him. *Young v. Taylor*, 2 *Binn.* 228. I am of opinion, therefore, that *Gurney's* executors were entitled to satisfaction of their testator's judgment out of the money in the hands of the sheriff, raised by the sale of *Maxwell's* land on *Fahnestock's* execution. At the same time, I desire it to be understood, that I mean not to lay down any general rule, but confine my opinion to the case before the court. There may be questions between lien creditors, and particularly between mortgagees and judgment creditors, which I intend not to touch. They are of great importance, and I leave them to be decided as they arise.

But there is another question in this case. There was evidence that Mr. *Burnside* was attorney for *Gurney* in his lifetime, and afterwards for his executors. When *Maxwell* was about to purchase from *Patton*, *Burnside* was pressed for a release of the lien on that land. This he positively refused to give, and, in consequence, *Maxwell* received from *Patton*, a bond with two sureties, to indemnify him against *Gurney's* judgment. Afterwards, other lands of *Patton* were sold, by virtue of an execution on a judgment obtained against him by *Philip Benner*. *Gurney's* judgment might have been paid out of the proceeds of this sale, but the money was applied otherwise by Sheriff *Rankin*, with the knowledge of Mr. *Burnside*, who did not interfere, but abstained from doing any act indicating his consent. It is proper to mention, that, at the time of this transaction, the stay of execution on *Gurney's* judgment had not expired. It is true, that after *Patton* had sold part of his land to *Maxwell*, the proper fund for the payment of *Gurney's* judgment was the remaining land of *Patton*, which ought, in the first instance, to have been resorted to. And I should think it very clear, that if *Gurney's* attorney had given a positive consent to the arrangement made between *Patton* and others, as to the proceeds of the sale on *Benner's* execution, it would be against equity that *Gurney's* executors should come on the land sold to *Maxwell*. I incline to think that the authority of Mr. *Burnside*, who had no written power of attorney, and his

(The Commonwealth, for the use of Gurney's Exrs., v. Alexander and others.)

consent to the payment of the money raised on *Benner's* execution, were facts proper to be submitted to the jury. And they were submitted, with the following instructions from the court:—"If, in this case, by the sale on *Benner's* judgment, an ample fund was raised to pay off all antecedent incumbrances, as well as the judgment in question, and the plaintiffs, by their agent, assented to that fund being paid over to *William Patton* himself, and did not claim it when they had the legal right; and after the other fund had been transferred *bona fide*, and for a full and valuable consideration, to *Maxwell*, notwithstanding the stay of execution was not up at the time, on the judgment which is the subject of this suit, we say that such facts would justify the jury in saying, that the plaintiffs have relinquished their lien as against *Samuel Maxwell*." I cannot say, that there is error in these instructions, though I think it would have been very proper to remark, that *Mr. Burnside's* positive refusal to give a release of the lien, and the bond of indemnity taken by *Maxwell*, were circumstances to which the jury should pay very serious attention. But they were not decisive, because it was possible, that although *Mr. Burnside* at one time refused to release the lien, he might, at another, have consented to a misappropriation of the money, which ought to have been applied to the satisfaction of *Gurney's* judgment. Although the stay of execution had not expired, the money might have been brought into court, and kept until *Gurney's* executors were entitled to call for it. A jury, however, should have very strong proof, before they conclude, that one who had refused to release, had afterwards committed the interest of his clients by consenting to a misappropriation. Whether the jury took this part of the case into consideration, I know not. It was unnecessary that they should; because the court had instructed them, that, independently of this point, the plaintiffs, on their own statement of their case, had no right to recover.

I am of opinion, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 21, 1826.]

WORK and another *against* The Lessee of MACLAY.

IN ERROR.

When this court reverses a judgment, and orders a *venire facias de novo*, it has a right to impose terms as to costs. But, where no terms are imposed, all the costs abide the final event of the suit.

WRIT of error to a special Court of Common Pleas of *Mifflin* county, in which the defendant in error was plaintiff, and the plaintiffs in error defendants.

This cause was an ejectment brought in the year 1801. It was tried several times. The first trial took place in the Circuit Court of *Mifflin* county, on the 26th of *May*, 1802, when the jury was discharged by consent, in consequence of not being able to agree. The plaintiff afterwards obtained a rule for a special jury and view, which was withdrawn. On the 29th of *May*, 1810, the cause was tried again, and the jury not being able to agree, they were discharged by the court. Another trial took place on the 22d of *August*, 1811, which was attended by a similar result. On the 23d of *August*, 1812, it was tried a fourth time, when a verdict was given for the defendants. The judgment on this verdict was removed to the Supreme Court, who reversed it and awarded a *venire facias de novo*. On the next trial, which took place on the 23d of *April*, 1813, the plaintiff obtained a verdict, which, on motion, the court set aside. The plaintiff again obtained a verdict on the 25th of *October*, 1814, the judgment on which was reversed by the Supreme Court, who again awarded a *venire facias de novo*. On the 23d of *May*, 1822, the cause was tried for the last time, when the jury found a verdict for the defendants. The judgment was removed, by writ of error, to the Supreme Court, where it was affirmed.

The costs of the defendants below, were taxed at one hundred dollars and seven cents.

To this taxation of costs, several minor exceptions were filed, which the parties agreed to adjust, but the plaintiff also excepted "*to all the costs which accrued previously to the 17th of June, 1816, at which time a venire facias de novo was ordered.*"

The President of the court below (REED) gave the following opinion:—

"1. When the jury is sworn in a cause, and cannot agree, and are thereupon dismissed by the court, neither party is entitled to costs from the other, but the costs abide the event of the suit, as upon a general continuance.

"2. When judgment is arrested after verdict, or reversed on a writ of error, and no *venire facias de novo* awarded, neither party is entitled to costs from the other.

(Work and another v. The Lessee of Maclay.)

“3. When judgment is affirmed, on a writ of error, the successful party is entitled to his costs in the court below.

“4. When a new trial is granted, without imposing terms, and another trial is had, the successful party is only entitled to his costs which accrued after the new trial being awarded.

“5. Where one or more verdicts or judgments have been had in the court below, and reversed upon a writ of error, and another trial is had, the successful party is only entitled to his costs from the other party, which accrued after the awarding of the last *venire facias*.

“The prothonotary is directed to correct the bill of costs, according to the principles here stated, and execution only to issue for such sum as shall thereupon be found to be due.

“I am aware, that some of the above positions do not correspond with the practice heretofore, in the interior of the state. But I am not aware that the practice referred to has been recognized by any judicial decision. Every position stated, is abundantly supported by *English* authorities, and the last, by the opinion of Judge WILSON, reported in 1 *Brown's Rep.* 334. I cannot discover that either policy or principle is much violated by a decision of the last point either way. It is very desirable, that the matter should be brought before the Supreme Court for decision. Important interests, as well as the uniformity of decisions in different districts, would be best settled in that way. This opinion is directed to be filed, to give the parties an opportunity of revision, if they think proper.”

The counsel for the defendants excepted to the opinion of the court below.

Burnside and *Bellas*, for the plaintiffs in error. The question is, whether, when this court reverses a judgment of the Court of Common Pleas, and awards a *venire de novo*, without making any particular order as to costs, the costs of the whole suit abide its final event? The uniform practice has been in accordance with the affirmative of this position, and to alter it now would occasion much confusion, and revive much litigation. It is therefore a question of considerable importance. This practice has never been called in question, except in the case of *Havard v. Davis*, 1 *Brown*, 334, the decision of which was founded upon *British* authorities, which can have no influence upon our practice. That case, therefore, has been very little regarded. The third section of the act of the 21st of March, 1806, 4 *Sm. L.* 327, is applicable to this case. *Lyon v. M^cManus*, 4 *Binn.* 167.

Hale, for the defendant in error. The defendants below were entitled to no costs, except those which accrued subsequently to the last order of this court for a *venire de novo*. This was the rule established by the case of *Havard v. Davis*, which has been followed in the country, though the practice in *Philadelphia* may have been different. The *English* authorities are agreeable to the

(Work and another v. The Lessee of Maclay.)

decision of the court below. Where a *venire facias de novo* is awarded, without any order as to costs, they do not abide the final event of the suit, according to the practice in the Court of King's Bench, though that of the Common Pleas is different. *Hullock's Law of Costs*, 395. 7 *Bac. Ab.* 423. This question is not affected by the 3d section of the act of the 21st of *March*, 1806, which does not extend to reversals in this court of the judgments of inferior courts.

PER CURIAM. This is a question of costs. The cause has been several times in this court before, when judgment was reversed; and a *venire facias de novo* awarded. When this court reverses a judgment, and orders a *venire de novo*, it has a right to impose terms as to costs. But where no terms are imposed, the understanding has been, that all the costs abide the final event of the suit. This practice has been uniform, and it is just; because the costs ought to fall on the party who is ultimately found to have been in the wrong. *English* authorities can have no weight, in a case which depends on our own practice. It appears, however, that the Courts of King's Bench and Common Pleas differ. In the latter, the costs abide the final event. In the former they do not. We held this case under advisement, from the last term, in order to have time to ascertain the practice, and we have ascertained it. All the costs abide the final event. It is our opinion, therefore, that the judgment of the Court of Common Pleas be reversed, as to costs only, and judgment entered for the plaintiffs in error, for all the costs which have accrued. As to all the rest, the judgment of the Court of Common Pleas is affirmed.

[SUNBURY, JUNE, 21, 1826.]

RERICK against KERN.

IN ERROR.

If a parol license be given, without consideration, to use the water of a stream for a saw mill, in consequence of which the grantee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the grantor; and if he divert the water to the injury of the grantee, the latter may maintain an action against him.

ON the return of a writ of error from the Common Pleas of *Union* county, it appeared from the record, that this was a special action on the case, brought by *Henry Kern*, the defendant in error, against *Henry Rerick*, the plaintiff in error, for diverting a water-course, in consequence of which he lost the use of his saw mill. The defendant pleaded, not guilty.

The material facts, proved on the trial, were, that some years

(Rerick v. Kern.)

before the institution of the suit, *Henry Kern*, the plaintiff below, being about to erect a saw mill on a stream which was designated by the witnesses as the right hand stream, a better seat for the mill was found by his millwright on what was termed the left hand stream. *Kern* thereupon applied to *Rerick* for permission to turn the water into the left hand stream, which was granted. In consequence of this permission, he built the saw mill upon the left hand stream. Without the aid of the right hand stream, the water of the left hand stream would have been wholly insufficient, but the right hand stream alone, would have served the purposes of the mill three or four months during the year. By a union of the two streams, the mill was rendered about a third more valuable than it would have been, with the right hand stream alone. No deed was executed, nor was any consideration given, but *Kern*, in consequence of the permission given by *Rerick*, built a very good mill, which did a great deal of business, and which he would not have built on the left hand stream, if the permission had not been given. When the water was turned away by *Rerick*, the mill was in good order, and it was further proved, that, at the time the trial took place, there was as much or more water in the left hand stream, than there had been before the erection of the saw mill.

The President of the Court of Common Pleas (CHAPMAN) charged the jury as follows:—

“Two questions arise in this cause. The first is, whether *Henry Rerick*, after permitting and agreeing that *Henry Kern* should turn the water from the right hand stream to the left hand stream, when, if he had not given that permission, he would have built his mill upon the right hand stream, can he *Henry Rerick*, afterwards withdraw his permission, and thereby destroy the use of *Kern's* saw mill. His withdrawing that permission after the mill was built, by removing the stones laid for the purpose of turning the water, if the jury believe these facts, would be a fraud and imposition upon *Henry Kern*, and he would have no right to remove them. But, if he had withdrawn his permission, and removed the dam before *Henry Kern* was at the expense of building a mill, he would have been justifiable in so doing. Or if the permission was by parol to enjoy a right which could only pass by grant for a consideration, it would be within the statute of frauds and perjuries, and not good in law. But if the jury believe the act was fraudulent in *Henry Rerick*, he is liable to pay damages to *Henry Kern* for the injury done him. Of the amount of damages the jury are the judges. The second question,—if the jury believe that no fraud has been committed by *Henry Rerick*, is, did *Rerick*, by removing the dam, divert the water from the left hand stream, so as to leave less water running in the left hand stream than there was formerly before the dam was erected? This is a fact for the jury, and if the jury believe that *Rerick* has diverted the water from the ancient channel, which

(Rerick v. Kern.)

he had no right to do to the injury of *Kern*, and that *Kern* has suffered damage thereby, the jury are to determine to what amount, if any damage the plaintiff has suffered."

The court was requested, by the counsel for the defendant, to instruct the jury in the following manner:—

"1. That if *Rerick*, about the year 1811, did allow the plaintiff, as proved by *William Teats*, to place an obstruction in the natural channel of one branch of the stream on *Rerick's* own land, yet that being without any consideration, and merely by parol, no legal right to the stream, or the use thereof, passed thereby to *Kern*, but *Rerick* had a right, at any time, to remove the said obstruction, so that the water could flow at any time in its natural channel.

Answer. "In answer to the first question,—he would have a right to remove the said obstruction, before *Kern* had incurred the expense of building a saw mill on the faith of *Rerick's* promise, or he would have had a right, if the permission or promise had been after the building of the mill, but not after he had induced *Kern* to be at the expense of building the mill.

"2. That an action for diverting an ancient water-course, does not lie for removing an artificial obstruction from the natural channel, whereby the water was made to flow as it used to do from time immemorial.

Answer. "That is the general principle of the law; but to this there are exceptions, where, by so doing, the party commits a fraud, and an action will lie. "

"3. That if the jury believe the whole evidence exhibited by the plaintiff in this cause, *Rerick* could legally, in the fall of 1821, remove the dam placed in the forks of the stream, by *Kern* on *Rerick's* land, and for removing the same no action lies, whether *Kern* sustained thereby a loss or not.

Answer. "If the jury believe that there was no fraud in *Rerick's* removing the dam, in which case he would have a legal right to do it, no action would lie.

"4. That if the jury believe the water, ever since the removal of the obstruction at the forks, has run, and continues to run, in its natural channel, as it used to do from time immemorial, their verdict should be for the defendant.

Answer. "If the jury so believe, and that no fraud was committed by removing this obstruction, or dam, then your verdict should be for the defendant."

The counsel for the defendant excepted to the opinion of the court, both in their charge to the jury, and in their answers to the several propositions submitted to them.

Greenough, for the plaintiff in error.

1. The plaintiff below, not satisfied with the great benefit he has derived, during a period of ten years, from the license granted to him by the defendant, wishes to establish it in perpetuity. To this he is not entitled. The bare permission to erect a dam on the

(Rerick v. Kern.)

defendant's land, without deed and without consideration, will not deprive the defendant of his property. The right to a water-course, is an incorporeal hereditament, which will only pass by deed, and cannot be claimed under a parol grant. *Angell on Water-courses*, 41. 3 *Bac. Ab.* 386. Where, indeed, a valuable consideration passes, and the agreement is executed, which was the case in *Le Fevre v. Le Fevre*, 4 *Serg. & Rawle*, 241, an interests vests. In the case before the court, there was no contract, nor was any consideration given by the plaintiff below; the defendant, merely from good will, having permitted him to keep up the dam, for the use of his mill, until his own interest called for a revocation of the permission. In *Dexter v. Hazen*, 10 *Johns.* 246, the defendant gave permission to the plaintiff to pass over his land with teams, &c. There was no consideration for the license, and it was held, that it might be revoked at pleasure. So, where the defendant agreed by parol to permit the plaintiff, for a guinea, to lay a tunnel over his grounds in order to draw water to the plaintiff's mill, and the guinea was not paid, the defendant having refused to receive it when it was tendered, Lord ELLENBOROUGH decided that the permission was revocable, and gave no title in point of law to the plaintiff. If the judge had charged, that the license could not be withdrawn until the plaintiff had derived benefit from his mill equal to the expense he had been at, there would have been no cause of complaint; but to go farther was error.

2. There was no evidence of fraud, and yet the court left it to the jury to presume fraud. Where there is no dispute as to facts, fraud is a question of law. *Sturtevant v. Ballard*, 9 *Johns.* 342. If it be left to a jury to decide what is fraud, there will be no certainty as to property in *Pennsylvania*.

Lashells, for the defendant in error.

Before the plaintiff below went to the expense of building his mill, he obtained the defendant's consent to make the dam, and if he had not obtained this permission, he would have built upon the other stream. The plaintiff was employed during a year in building the mill, and the defendant was a witness to the prosecution of the work. It would be unjust to suffer the defendant, under such circumstances, to retract the license he had given. The case is quite different from that of a privilege to pass over another man's land, in reference to which no expense could have been incurred. If the plaintiff was induced to go into any expense, however small, by the license and encouragement of the defendant, that license can never be revoked. If it can be revoked at the end of ten years, it may at the end of ten months, or ten weeks, or immediately, which will scarcely be pretended. This case resembles a parol sale or a parol gift of land, accompanied with possession. If a father make a parol gift of land to his son, and possession be delivered, and improvements are made by the son, it is good. *Syler v. Eckhart*, 1 *Binn.* 178. It is a fraud for a man to conceal his

(Rerick v. Kern.)

title, while he sees another by mistake build on his land. 3 *Bac. Ab.* 301. A parol license, given to put a shed over an area, cannot be retracted without paying the expenses incurred in consequence of the license. 2 *Esp. N. P. (Gould's Ed.)* 268, (636.) The same principle is laid down by Judge DUNCAN, in *Le Fevre v. Le Fevre*, 4 *Serg. & Rawle*, 241. At all events, the plaintiff should not be permitted to retract his license, without indemnifying the plaintiff. He should at least place him in as good a condition as he would have been in, if the license had not been granted.

The opinion of the court was delivered by

GIBSON, J. To the objection, that an action for diverting an ancient water-course, is not supported by evidence of the removal of an artificial obstruction, it is sufficient to answer, that in the case before us, the right depends, not on the antiquity of the water-course, but on the agreement of the parties; and the question therefore is, would equity carry this agreement into effect?

That such an agreement may be proved by parol, was settled in *Le Fevre v. Le Fevre*, 4 *Serg. & Rawle*, 241. which, in this respect, goes as far as the case before us. The defence there was, that the right, being incorporeal, and therefore lying in grant, could pass only by deed. But, as the agreement was for a privilege to lay pipes, it is evident that the right acquired under it was no further incorporeal than that which passes by the grant of a mine, or of a right to build, which indisputably vests an interest in the soil. A right of way, which has been thought to approach it more nearly, in fact differs from it still further. But the defence in this case, is put on other ground, it being contended that a mere license is revocable under all circumstances, and at any time.

But a license may become an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior, should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action

(Rerick v. Kern.)

for damages would be an inadequate remedy. How very inadequate it would be in a case like this, is perceived by considering that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent.

A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or any thing else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by non user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial when weighed with the loss that would be caused, by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure for ever. But it is otherwise, where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed that expending money or labour, in consequence of a license to divert a water-course or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired, and we are unable to discover an error in the opinion of the court on the points that were propounded.

Judgment affirmed.

[SUNBURY, JUNE 21, 1826.]

VANDERSLICE *against* GARVEN.

IN ERROR.

In ejectment, under the act of the 21st of *March*, 1806, judgment by default, at the first term, is irregular.

THIS was a summons in ejectment, brought by the defendant in error against the plaintiff in error, in the Court of Common Pleas of *Northumberland* county, under the act of the 21st of *March*, 1806. At *April* Term, 1823, the writ was returned, "served;" and, at the same term, on motion, judgment was entered against the defendant, by default.

The error complained of by *Bellas*, for the plaintiff in error, was, that judgment by default had been entered at the first term, whereas the act of the 21st of *March*, 1806, *Purd. Dig.* 146, gave the defendant until the second term to put in his defence. This provision is not repealed by the supplementary act of the 13th of *April*, 1807, *Purd. Dig.* 146, which does not say at what time judgment shall be entered.

Greenough, for the defendant in error, answered, that by the second section of the act of the 13th of *April*, 1807, the court was authorized to give judgment at the first term, and this had always been the practice.

The opinion of the court was delivered by

DUNCAN, J. Under the act of the 21st of *March*, 1806, the form of summons in this new mode of ejectment is prescribed, as well as the duty of the plaintiff and defendant. It is made the duty of the plaintiff, "to file in the prothonotary's office, on or before the first day of the term to which the process is returnable, a description of the land, and the defendant shall enter his defence, (if any he hath,) for the whole or any part thereof, before the first day of the next succeeding term, and thereupon issue shall be joined." The plaintiff could take no step, except filing his description, until the second term. The defendant was not bound to do any thing until the second term. He was not required to appear at the first time. Judgment by default could not be taken against a man who had not defaulted. If he chose to defend, he had till the second term so to do. The same act of the 21st of *March*, 1806, gives the same time to the defendant in all cases of debt or contract. It is not reasonable to suppose, that the legislature would make a distinction between ejectments and contracts. They have not done so, and courts of law ought not to distinguish. *Ubi lex non distinguit, nec judices distinguere debent.* The question was incidentally brought before me at *Nisi Prius*, at *Philadelphia*, in *Cromwell v. The Farmers and Mechanics' Bank*, in which I held that judg-

(Vanderslice v. Garven.)

ment by default in ejectment, at the first term, was irregular. In the action of ejectment, under the ancient practice by declaration in ejectment, the course was to enter a rule against the defendant, or rather the tenant in possession, on whom the declaration was served, to appear and plead, and enter into the common rule to confess lease of entry and ouster in six weeks; and if he did not appear and enter into the common rule, to enter an office judgment at the end of six weeks. This was, as far as my knowledge extends, the universal practice, and was in accordance with the practice on original process to give time to plead. A rule to plead was taken, and, if the plea was not entered, judgment was entered by default. The proceeding by summons, under the act of the 20th of *March*, 1724, authorizing the plaintiff, if a summons has been served ten days before the return day of the writ, and declaration filed five days before the term, to file a common appearance, for the defendant making default to appear, and to take judgment by *nihil dicit*, has given rise to the mistake, that it may be done in all cases, where the process is by summons; but this is a practice unwarranted by any law. The supplementary act of the 27th of *April*, 1807, makes no alteration in the original act in this particular.

This cause was continued under advisement, to give the court an opportunity of inquiring into the practice. In different counties, a different practice has prevailed; but, in most cases, the practice has been, to take judgment by default the second court. Had a general practice prevailed since the passage of the act, to take judgment by default the first term, I would hesitate before I disturbed possessions derived under such uniform usage; but solitary instances ought not to prevail. And, in this county, there is a rule of court conforming to the exact letter of the law, and which regulates the practice as to the manner of taking judgment by default: The plaintiff may, on the first day of the second term, enter of course on the docket, a rule to plead by the first day of the term, when it is but for one week, and by the second Monday of the term, when it is to be continued for two weeks, and, upon failure of the defendant's so doing, judgment may be entered by default. I am therefore of opinion, that the judgment is erroneous, and must be reversed.

Judgment reversed.

[SUNBURY, JUNE, 21, 1826.]

TOMPKINS *against* SALTMARSH.

IN ERROR.

29 PFS 106

A voluntary bailee, without reward, is responsible for the loss of the goods intrusted to him, only in cases of *gross negligence*.

In an action against a voluntary bailee, for the loss of goods by carelessness and negligence, he may give in evidence his own acts and declarations, immediately before and after the loss, to repel the charge.

But the defendant cannot himself be examined, to prove that the loss was not occasioned by his own neglect, carelessness, and mismanagement.

WRIT of error to the Court of Common Pleas of *Bradford* county.

Orlando Saltmarsh, the defendant in error, brought this action against *Isaac Tompkins*, the plaintiff in error, and filed a declaration containing five counts. The first three, which nearly resembled each other, alleged, that *Saltmarsh* delivered to *Tompkins*, at *Georgetown*, in the District of *Columbia*, five bank bills of fifty dollars each, to be conveyed by him to *Athens*, *Bradford* county, *Pennsylvania*, there to be delivered to the plaintiff; that the defendant undertook safely and securely to keep the said bills, and safely to deliver them to the plaintiff, but that by his carelessness, negligence, and mismanagement, they were wholly lost to the plaintiff. The fourth count was for two hundred and fifty dollars, money had and received by the defendant to the use of the plaintiff, and the fifth on an *insimul computassent*.

The case, as proved on the part of the plaintiff, was, that he delivered to the defendant the bills enclosed in a letter to *D. Alanson Saltmarsh*, to be delivered to him at *Athens*, and that the letter never was delivered to him. This was proved by *D. A. Saltmarsh* himself, who stated that he had some conversation on the subject with Mr. *Tompkins*, on his return.

The defendant, after having proved that a valise, which he had borrowed of a friend, and which was produced in court, was sound and whole when he received it, and that when it was returned two of the loops were cut in such a manner that the hand might be introduced into it, offered in evidence the deposition of *Dana S. Upson*, taken in *Philadelphia*, in *February*, 1824, to those parts of which, printed in italics, the counsel for the plaintiff objected, and they were rejected by the court, who sealed a bill of exceptions. The parts excepted to are so connected with the rest of the deposition, that it is necessary to give the whole of it. It was in these words:—

“That a man of the name of *Tompkins* lodged with him, (the deponent,) about a year ago last *December*, according to the best of his recollection, a day or two, and then left for *New York*, as he stated. He was a tall young man, from twenty-seven to thirty years

(Tompkins v. Saltmarsh.)

of age, and wore a white hat. *One or two days elapsed, and he wrote deponent a letter by mail, stating he had met with the loss of a sum of money.* The same morning on which deponent received the letter, he stepped over to *Solomon Allen's* office, and saw a letter which *Mr. Tompkins* had written to him. *Deponent thinks it was on Monday morning; Mr. Allen asked deponent about it.* The same day on which deponent received the letter, or on the next, but deponent thinks the same day, *Mr. Tompkins* came to deponent's house again, and made a short stay. *Mr. Tompkins stated, that he had been robbed of a sum of money, and seemed to think it had been stolen in deponent's house; that he did not examine his baggage from the time he left deponent's house, until he had got to New York. He stated he should not feel so unpleasantly about it, if it were his own; that it had been sent by another man. Deponent has examined for the letter he received; he thinks it contained the same account of the transaction which Mr. Tompkins afterwards gave in conversation.* Deponent further states, that the first time *Mr. Tompkins* came there, he occupied room No. 9, and does not recollect he took a room the second time he came. The room in which *Mr. Tompkins* lodged, if he lodged in No. 9, as deponent thinks, has four beds in it; if in No. 11, but one bed. It is probable there were other persons in No. 9, the same night. Deponent further states, *that it is the custom of the house to send the baggage of persons stopping there, immediately to the room in which they are to sleep, and it is not customary to take the baggage to any particular room, or to lock it up. Deponent thinks it would be perfectly safe, and no mark of negligence for any person arriving at his house to have his baggage taken to his room, and there leave it until bed-time. If Mr. Tompkins lodged in No. 9, as deponent thinks, he would not have been at liberty to lock the door and take the key away. Deponent further states, that Mr. Tompkins appeared much concerned at the loss, and was anxious to take all means to trace the money, as any one would be in a similar situation.* Deponent further states, he keeps the hotel in the city of Philadelphia called *Judd's Hotel*, and that he kept it in December, 1822.

“Deponent being cross-examined, says, he does not distinctly remember at what time of day *Mr. Tompkins* first arrived at his house: he thinks, however, it was by the *Baltimore* boat, about ten o'clock in the morning. He does not remember any thing in relation to *Mr. Tompkins's* baggage, except what he learned from conversation with him, when he came the second time. He does not know that *Mr. Tompkins* requested the bar keeper to take care of his baggage, or any thing belonging to him. Deponent says, there were locks both on the rooms No. 9 and No. 11, at least deponent presumes so, as there were locks on the rooms generally. Deponent says, unless the house is very full, a single

(Tompkins v. Saltmarsh.)

bedded room can generally be had, if called for. He thinks that in *December, 1822*, Mr. *Tompkins* could have had such a room, if he had asked for it. He does not know, as he has said before, whether Mr. *Tompkins* roomed in No. 9 or No. 11. Deponent knows nothing of the situation of Mr. *Tompkins's* baggage in his room, or how long he was absent from the house while in *Philadelphia*. Mr. *Tompkins* left *Philadelphia* for *New York*, at twelve o'clock in the day time, in the Union Line steam boat. Deponent does not know whether Mr. *Tompkins* made any purchases in *Philadelphia*, or whether he left a bundle or any thing else in possession of the bar keeper. Deponent presumes that when Mr. *Tompkins* went to *New York*, the porter of the house, *James Brady*, took his baggage out of his room. When Mr. *Tompkins* returned from *New York*, he was not altogether positive in his assertions that he had lost the money in deponent's house, but he seemed to be of that opinion. He said he had not opened his baggage from the time he left deponent's house, till after he arrived in *New York*. When he left *Philadelphia* the second time, he did not express any dissatisfaction with deponent's conduct or house. Deponent cannot say that Mr. *Tompkins* said the money was lost in *Philadelphia*. Deponent does not remember that Mr. *Tompkins* told him his valise had been cut. He does not remember, either, what particular article of baggage Mr. *Tompkins* spoke of, when he mentioned his baggage."

The defendant's counsel then offered in evidence, the letter referred to in the preceding deposition, which was objected to by the counsel for the plaintiff, and rejected by the court. It was as follows:—

“*New York, Dec. 11, 1822.*

“Mr. *Upson*:—Dear sir, When I take into consideration all the circumstances relative to the loss of my money, the conclusion that it was stolen at your house fixes itself irresistibly upon my mind. From the time I left the city of *Washington*, until I arrived at *Philadelphia*, my valise was not out of my possession long enough at a time for any one to have committed such a depredation, and it seems impossible it should have been done on board the boat, inasmuch as it stood near the entrance into the cabin, within eight feet of the helmsman, the whole way, on board of both boats. And in the room into which my baggage was taken here, there were two very respectable merchants from *Albany* writing in the room all the afternoon. The robbery was unquestionably committed at your house, by some person who has access to your rooms, either some of your boarders or servants. Be so good as to watch upon them. It was taken, most likely, on *Thursday* evening, perhaps on *Friday* morning. If you receive information on the subject, be so good as to lose no time in communicating it to me at *Athens, Penn.*

Yours, respectfully,

“*Isaac Tompkins.*”

(Tompkins v. Saltmarsh.)

The deposition of *Abisha Jenkins*, the master of a steam boat between *Philadelphia* and *New York*, was then offered in evidence by the counsel for the defendant, objected to by the plaintiff's counsel, and rejected by the court, to whose opinion exception was again taken. This deposition was as follows:—

“*Abisha Jenkins*, mariner of *Philadelphia*, aged forty-four years and upwards, a witness produced on the part of the defendant, in the above suit named, being duly sworn, deposeth and saith, that, from the best of deponent's recollection, about two years ago a young man came on board the steam boat *Philadelphia*, and went on to *New York*. In a very few days, perhaps the next day or the day after, the same man came on board the boat again at *Philadelphia*, to inquire whether deponent knew any thing about some money which he had lost. He stated, that he had arrived in *Philadelphia* and put up at *Judd's Hotel*; that he had there opened his valise to change his clothes, and that he did not open it again until he arrived in *New York*. He further stated, that at *New Brunswick* he had taken his valise into the room with him. His inquiry of this deponent was, whether the valise could possibly have been opened on board the steam boat at dinner time. Deponent replied, that he thought it impossible that it could have been done on the passage, as a man was always at the helm, and the baggage directly in front of him. He stated to this deponent the amount of the money lost, but deponent does not now recollect the sum. Deponent thinks he saw the valise, and the manner in which it was cut, but is not clear in his recollection. Deponent does not recollect that he stated he had lost any of his own money at the same time. Deponent recollects that the young man took a list of the passengers from the books of the boat, and thinks the paper now shown to him and marked A, is the same list. Deponent knows that the list must have been taken from the books of the boat, but the books of the boat containing the names of the passengers are now at *Trenton*, and the deponent cannot refer to them. Deponent cannot recollect the name of the young man, nor can he recollect where he stated he was from. Deponent does not think that leaving a valise with the rest of the baggage would be at all unsafe aboard the boat. Deponent does not think it would be an act of negligence or carelessness to leave baggage in the cabin, or any other part of the boat on her passage. Deponent further states, that the young man told him he had not discovered that the money was lost, until he had arrived at *New York*. Deponent thinks he stated he had been out in *New York* before he discovered the loss, and that he returned to *Philadelphia* in pursuit of the money by the first conveyance from *New York*. The deponent further states, that the young man expressed some anxiety upon the subject of the loss, as much so as the occasion called for.

(Signed)

“*Abisha Jenkins.*”

(Tompkins v. Saltmarsh.)

The plaintiff declined a cross-examination, and reserved the right of excepting to this deposition, in whole or in part, on the trial of the cause.

The defendant's counsel proposed to ask *D. A. Saltmarsh*, on his cross-examination, what reason the defendant gave him, on his return to *Athens*, for not delivering the money, and what account he gave of the matter. They proposed to ask the same question of *Ebenezer Bockius*, a witness on the part of the defendant, and they proposed to examine *Isaac Tompkins*, the defendant, to prove that he had been robbed of the money committed to his care by the plaintiff, while on his way from *Georgetown* to *Athens*.

To the evidence thus offered, the counsel for the plaintiff objected, and the court sustained the objection. A bill of exceptions was taken to their opinion.

In this court, errors were assigned in the admission of the testimony, stated in the several bills of exception returned with the record.

Williston and *Mallory*, for the plaintiff in error, cited, 1 *Phil. Ev.* 218, 219. *Meeker v. Jackson*, 3 *Yeates*, 442.

Conyngnam, for the defendant in error.

The opinion of the court was delivered by

DUNCAN, J. A question is not made, whether the proof met the allegation of the plaintiff. The declaration states, that the bills were to be delivered to *Orlando*; the evidence was, that they were to be delivered to *D. Alanson*. I doubt very much whether the plaintiff could recover on that evidence. Giving, however, no opinion on this, but confining myself to the errors assigned, I proceed to inquire whether the testimony of *Dana S. Upson* and of *Abisha Jenkins*, the letter from *Tompkins* to *Upson*, and the proof of the conversation between *D. Alanson* and *Tompkins*, on his return to *Athens*, ought to have been received, and whether there was error in rejecting the examination of *Tompkins*, who was offered as a witness to prove the alleged robbery.

The plaintiff did not allege, that *Tompkins* purloined, embezzled, or converted the money to his own use. He admits that he lost the bank bills by carelessness, negligence, and mismanagement, and it is for negligence in the performance of this voluntary undertaking that the action is brought, and all the evidence must be considered with relation to that charge. *Tompkins* is charged as the bailee of *Saltmarsh*, on an undertaking to perform a gratuitous act, from which he was to receive no benefit, and the benefit was solely to accrue to the bailor; in which case the bailee is only liable for gross negligence, *dolo proximus*, a practice equal to a fraud. It is that omission of care which even the most inattentive and thoughtless men never fail to take of their own concerns. There is this marked difference, in cases where ordinary dili-

(Tompkins v. Saltmarsh.)

gence is required, and where a party is only accountable for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns, and that diligence is necessarily required where the contract is reciprocally beneficial. The bailee is not bound to ordinary diligence, is not responsible for the omission of that care which every attentive and diligent person takes of his own goods, but only for the omission of that care which the most inattentive take. One who was bound to use ordinary diligence, and suffered the goods to be taken by stealth out of his custody, was held by Sir WILLIAM JONES, not to have used ordinary diligence; but a contrary practice now prevails. But *Tompkins* was not bound to use ordinary diligence; he was not bound to lay aside all other business to take the direct road from *Georgetown* to *Athens*; he is only answerable for gross neglect; and, though the question is something new, and not without its difficulties, my opinion is, that it was competent for *Tompkins* to show, that immediately on the receipt of the letter, he proceeded to *Philadelphia*, to *New York*, and to *Athens*, and to show how he conducted himself, what care he took of his own property, that his care was the usual and ordinary care.

Evidence is constantly accommodating itself to the state of society and the concerns of the world, and therefore must accommodate itself to the altered mode of travelling by stage coaches and steam boats, instead of on horse back or in private carriages. Travellers are constantly more exposed to secret stealth in a crowded stage, or in a steam boat crowded with passengers, where the traveller cannot keep his eye on his own baggage. Inns in our large cities are generally filled with strangers, and, with the utmost circumspection, he is certainly more exposed to these risks. To preclude a gratuitous bailee from showing how he conducted himself, and what care he took of his own property, would be shutting out all defence. The evidence offered was of a time directly after the receipt of the letter. I am of opinion, likewise, that evidence ought to have been received of the hue and cry immediately after the discovery; his assiduous and indefatigable pursuit, and strict search, both at the inn and the steam boat. If he had made no complaint, or no inquiry, remained with his arms folded and his mouth shut, this would have afforded strong evidence of his delinquency; and though it has been said this would have been the course of a guilty man, yet it was one which an innocent man would naturally take, and which, if he did not take, all would condemn him. Nothing would more strongly prove his neglect than this silence, this indifference,—the jury would have drawn the most unfavourable conclusions from it. The next best evidence to proof of a thing itself, is proof of those circumstances which naturally would attend it. These were, the production of the cut valise, the immediate promulgation of the theft, and pursuit of the property. It has been said, this is the party making evidence for

(Tompkins v. Saltmarsh.)

himself. It is not,—but evidence of circumstances immediately preceding, and directly following the stealth. The direct proof would be difficult, and is not to be looked for. The circumstances that would naturally attend the whole transaction of a man placed in the situation in which the defendant stood, in such case, from necessity, is proper evidence. It is a presumption which the jury ought to weigh with candour, but with circumspection. It is more or less strong, as the conduct of the party might appear to be natural, and consistent with his innocence, or otherwise, and a mere sham. Even in criminal proceedings, the declarations of prisoners have been received to explain their conduct, as, in an indictment for larceny, that he took the goods claiming the property. The jury hear the evidence, and then judge whether these declarations were genuine claims of property, though mistaken, or made to colour a stealing. 1 *Hale, Pl. Cr.* 509. 1 *Shower*, 502. 2 *Barn.* 174. In trials for murder, declarations of the prisoner antecedent to the fact, are admissible to reconcile or explain his conduct. 2 *Harr. & M'Hen.* 120. And, in the hottest times, in trials for high treason, the declarations of a prisoner have been admitted in evidence to explain his acts.

Had *Tompkins* been indicted for purloining this money, surely this conduct could be received in his exculpation; for no man would be the bearer of a letter with money, at the risk of reputation and property, if he were obliged to prove that his trunk was broken open, or his valise cut open, by witnesses who saw the act done. It would be unreasonable to look for such evidence. It could only be made out by circumstances, whether or not the bailee was guilty of gross neglect. All this is, however, to be understood of acts immediately preceding and directly following,—concurrent acts and declarations, not acts and declarations not known or commenced until after a lapse of time, and suspicion afloat. That nothing that a man does or says can be given in evidence to support his own cause, is a good general rule. It has, like other general rules and positions, exceptions; if it had not, it would be better to have no general rule.

The rules of evidence are founded on general interest and convenience, and must from time to time admit of modifications. To adapt them to the actual condition of the business of men, they must conform themselves to the exigencies of society. 9 *Wheat.* 332. And it is for this reason, shop books which are the books of a plaintiff, are admitted in evidence.

The deposition of *Upson*, with the letter annexed, except that part of it which is contained within double brackets, ought to have been admitted, and likewise the deposition of *Abisha Jenkins*, to show the concomitant acts and declarations of *Tompkins*, immediately before and after the loss; for the declaration admits the bills were lost, and it is proved that *Saltmarsh* said they were lost. As all was before any claim made by *Saltmarsh*, it was evidence

(Tompkins v. Saltmarsh.)

of the whole *res gesta*, the entire conduct, immediate declaration, and hot pursuit of the defendant. It was evidence of his baggage being secured in the usual way at a respectable inn, and of the manner in which the baggage of passengers was stowed away in the steam boat. It was for the jury to say, whether these declarations and searches were colourable, and not honestly made; whether all this anxiety was affected and not real, to cover a fraud; for if that was the case, this would prove something more than gross negligence. They prove, if not an actual larceny, an act of baseness exceeding in moral turpitude the picking of *Saltmarsh's* pocket,—charges never made against the plaintiff in error. In this point of view, the evidence was admissible; but no member of this court ever doubted of the propriety of the rejection of the defendant on record as a witness. He stood as any other defendant stands, and he must make out his defence by disinterested witnesses. He could not be permitted to prove that the loss was not by his neglect, carelessness, and mismanagement. It is not like any of the cases cited by the counsel of the plaintiff in error. A party may be a witness to prove the loss of a written instrument, having first proved its existence and contents. I think the questions put to *D. Alanson*, on his cross-examination, should have been received, who swore that he never received the money, and that he had some conversation with *Tompkins* about it on his return. He was the person to whom the package was directed. He said he had some conversation with him. The circumstances in which he stood, with respect to this money; his stating there was a conversation, entitled the defendant to have the whole of it. For the same reason, *Bockius*, who was present, ought to have been permitted to prove the conversation. It was held immediately on his return, and is to be considered as part of the whole transaction. It is to be observed, that the plaintiff below gave no evidence of any act of negligence by *Tompkins*; barely the delivery of the package. I know not how even a careful and attentive man could escape, if evidence such as the plaintiff gave, of the bare delivery of the package, was to charge him with the amount admitted to be lost; if he, without benefit or reward, having undertaken to do a favour for his friend, could not be discharged for the casualty, without direct evidence how it arose, by some eye-witness. No prudent man ever would carry a letter on these terms. There is in all these cases, I admit, a difficulty,—suspicion will attach,—the most upright man will feel mortification; but it is inconsistent with the state in which the law has placed the voluntary depository, who acts for the benefit of another, to cast upon him the burden of showing exactly, by witnesses, the *quo modo* he lost it, when the bailor admits that somehow he did lose it. The facts and circumstances are all for the consideration of the jury. To keep them from them is excluding the only light which can be shed on the conduct of the party charged, with negligence alone.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 28, 1826.]

LYON and another *against* The HUNTINGDON BANK.

IN ERROR.

In an action on a single bill, the defendant may, under the plea of payment, with notice of special matter, prove that the bill was taken, subject to a parol agreement made long before its date.

ON a writ of error to the Court of Common Pleas of *Huntingdon* county, it appeared that this was an action of debt, brought by the *Huntingdon* Bank, against *John Lyon* and *Robert T. Stewart*, the plaintiffs in error, who were defendants below, on a single bill for seven thousand three hundred and ten dollars, dated the 20th of *January*, 1818. The defendants pleaded payment, with leave to give the special matter in evidence, whereupon issue was joined. Notice, agreeably to the rule of the Court of Common Pleas, was given by the defendants to the plaintiffs, of the special matter intended to be given in evidence. On the trial of the cause, the plaintiffs objected to the evidence, and the court sustained the objection, and rejected it. The opinion of the court was excepted to by the defendants, and the question before this court was, whether the evidence was admissible. The special matter was placed on the record; but it is necessary only to mention so much of it as is necessary to explain the opinion of the court. Some time in the year 1814 or 1815, *William Patton* was in possession of sundry judgment bonds from *Edward B. Patton* and *Robert Porter*, amounting to nearly eleven thousand dollars principal, besides considerable arrears of interest. These bonds were payable to *William Patton*, at different periods, in the years 1816, 1817, 1818, and 1819. *William Patton* produced the said bonds to the officers of the *Huntingdon* Bank, and proposed that the bank should make him a loan of ten thousand dollars, solely on the credit of those bonds. After some consideration, the officers of the bank informed him that he should be accommodated with ten thousand dollars, solely on the credit of the said bonds, which were considered as sufficient security, and would be received entirely at the risk of the bank; but that it would be necessary, in compliance with the rules of the bank, for form's sake, to put in his note for ten thousand dollars with an indorser; that neither he, nor his indorser, should ever be considered as liable on the said note, or any other note which might be put in for the renewal of the same; that the said note might be renewed from time to time, until all the said bonds should become due, or so many of them as would be sufficient to discharge the said note, which should then be considered as cancelled; and, further, that the bank would never make any call for the payment of the said note, or any note put in for its renewal, nor would they

(Lyon and another v. The Huntingdon Bank.)

insist on the said *William Patton*, or any person for him, paying the discounts on the renewals of the said note, without the consent of the said *William Patton*, and in no event would the said bank bring suit on the said note, or any other which might be put in for the renewal of it; but the said note, and all others put in for the renewal of the same, should be considered merely matters of form, without any responsibility. On this condition, the said *William Patton* agreed to take the said loan, and assigned the said judgment bonds to the bank under his hand and seal, in the presence of two subscribing witnesses. In pursuance of the aforesaid agreement, the said *William Patton* put into the bank his note for ten thousand dollars, indorsed by *Edward B. Patton* and *John Lyon*, one of the defendants, who, previous to their indorsement, had been informed by *William Patton* of all the circumstances of the agreement between the bank and him; and the said *Lyon* became an indorser, in consequence of his understanding that he was never to be called on for payment, and would not otherwise have put his name on the said note. This note was from time to time renewed, with the same indorsers, until about the 3d of *September*, 1816, when it was reduced, by partial payments, to seven thousand three hundred and ten dollars, for which sum *William Patton* put in his note, with the same indorsers. This last note was renewed several times, with the same indorsers, when *William Patton* became insolvent. It was then renewed, the said *Edward B. Patton* and *John Lyon* being the drawers, and *Robert T. Stewart*, (the defendant,) the indorser, without any alteration of the condition on which the original note was given. Some time after this, the bank, to avoid the expense to which their debtors were put, by the stamp duties imposed by a law of the *United States*, made a rule, that notes should be put in under seal, with the former indorsers as securities. In compliance with this rule, the defendants gave their single bill without any alteration of the original terms on which *William Patton's* first note was given. The single bill of the defendants, on which this suit was brought, was for a balance on the note for ten thousand dollars, originally put in by the said *William Patton*, indorsed by *Edward B. Patton* and *John Lyon*, as before mentioned. And, moreover, it was intended to be proved, that a very considerable loss had been sustained, in the said assigned bonds, by the negligence of the officers of the bank.

All this evidence was rejected, on the principle of its being improper to admit parol evidence, for the purpose of altering or affecting the substance of a written instrument.

Blanchard, (with whom were *Greenough*, *Smith*, and *Allison*,) for the plaintiffs in error, being about to commence his argument, THE COURT desired to hear the counsel on the other side; upon which, *Potter*, (with whom was *Hale*,) for the defendant in error, observed, that when the defendants below executed the single bill,

(Lyon and another v. The Huntingdon Bank.)

upon which this suit is brought, they knew that no judgments had been entered on the bonds which had been received by the bank. They knew, also, that judgments had been entered by other persons, against the obligors in those bonds. In short, they knew the principal matters upon which they now depend for their defence. The notice of special matter does not state that the obligors in this bill had any communication with the bank previous to their execution of the bill. No parol evidence is admissible to destroy a sealed instrument, such as that upon which this suit is founded. All the judges of this court have expressed their regret, at the length to which parol evidence has been permitted to go in *Pennsylvania*, to affect written instruments, and their determination to go no further. A review, however, of the adjudged cases, will show that they have never yet gone the length now required. *Wallace v. Baker*, 1 Binn. 610. *Church v. Church*, 4 Yeates, 280. *Thompson v. White*, 1 Dall. 424. *Field v. Biddle*, 1 Yeates, 132. *M'Meen v. Owen*, 1 Yeates, 138. *Little v. Henderson*, 2 Yeates, 298. *Dinkle v. Marshall*, 3 Binn. 588. *Christ v. Diffinbach*, 1 Serg. & Rawle, 464. *Barndoller v. Tate*, 1 Serg. & Rawle, 140. *Cozens v. Stevenson*, 5 Serg. & Rawle, 424. *Campbell v. M'Clenachan*, 6 Serg. & Rawle, 171. 6 Serg. & Rawle, 410. 7 Serg. & Rawle, 115. The case of *Heagy v. Umberger*, 10 Serg. & Rawle, 339, bears a close analogy to this. There, the plaintiff sold to the defendant a horse, and received from him an assignment of a single bill, to be taken at his risk; and parol evidence that, at the time of the execution of the assignment, the assignor undertook that the obligor in the bill should be good for the money, was rejected. There was no allegation of fraud, and the action was *assumpsit*.

TILGHMAN, C. J., who delivered the opinion of the court, after stating the case, proceeded as follows:—

It is very true, that it is a rule of law, subject, however, to exceptions, that a writing is to be construed according to its own words, without resort to parol evidence; also, that where there is an agreement in writing, parol evidence of the same agreement is inadmissible. But the evidence offered in this case does not fall within that rule. It was not pretended, that there was any thing wrong in the single bill, or that any alteration whatever should be made in it. The object of the evidence was, to show that it was subject to an agreement made long before its date. If that agreement had been under hand and seal, I presume it would not be contended, that this single bill would not be controlled by it. The question will be, then, whether an agreement of that kind could not have been made by parol. I can see no reason why it should not. The special matter given in evidence, under the plea of payment with leave, &c., has been compared to a bill in equity. In *Robinson v. Eldridge*, 10 Serg. & Rawle, 142, it was said by the court, to be in nature of a bill in equity, and if the defendant makes out a case, which would entitle him to relief in equity, he

(Lyon and another v. The Huntingdon Bank.)

shall have it here. In that case, as in the present, the defence consisted of a number of facts which took place at various times, but were of a connected nature, and all tended to make one whole. The counsel for the plaintiff relied strongly on the case of *Heagy v. Umberger*, 10 *Serg. & Rawle*, 339. There, the plaintiff sold to the defendant a horse, in consideration of which, he received from him an assignment of a single bill, expressly to be taken at his own risk. The plaintiff offered parol evidence, that at the time of making the assignment, the defendant asserted and undertook, that the obligor in the assigned bill was good for the money; but the court rejected the evidence. We may perceive, at the first glance, the difference between that case, and the one before us. There, the evidence was in direct contradiction of the writing, and no fraud was alleged. The writing declared, that the assignor should not be responsible,—the evidence went to prove that he should be responsible. But even in that case, if the assignor of the bill had known that the drawer was insolvent, an action would have lain against him for the deceit, and the parol evidence would have been admitted to prove it, because proof of the deceit would not have been in contradiction of the writing. If a bill in equity had been filed by the defendants, stating the facts contained in the notice of special matter, and the facts had been admitted, can it be doubted that they would be relieved. The Chancellor would have enjoined the bank from ever bringing suit on the bill, and if the facts had been denied, the complainant would have been permitted to prove them by parol evidence. Could any thing be more fraudulent, more repugnant to equity and good conscience, than to prosecute an action on this bill in the very face of the agreement under which it was given? Most of the cases of parol evidence which have occurred in our courts, have been when one has been induced to execute a writing, in consequence of something which has passed immediately prior to the execution. In such cases there was fraud, and parol evidence has been admitted for the purpose of altering and correcting the writing; and the judges have frequently said, that the evidence was to be confined to what took place at, and immediately before its execution. But it is evident that this rule cannot be applied to cases where fraud was committed, not by any thing which took place about the time of the execution of the writing, but long before. We decided at the last *May Term*, at *Lancaster*, in the case of *Stubbs, Adm., v. King*,* that when the vendor of a tract of land had carried the vendee to the ground, and showed him false boundaries, some time before the execution of his deed of conveyance, and the vendee had afterwards accepted the deed, and given his bond for the purchase money, parol evidence might be received to prove the fraud, in an action brought by the vendor on the bond of the vendee. Indeed, there are innumerable instances where fraud must be tri-

* *Ante*, page 206.

(Lyon and another v. The Huntingdon Bank.)

umphant, unless you are permitted to trace it to its source, and pursue it through all its windings. And this can never be done, if parol evidence is excluded. In the present instance, though no fraud might have been originally intended by the officers of the bank, yet it would be fraudulent to prosecute an action under the circumstances stated by the defendants, all of which we must presume to be true, because they offered to prove them. Whether they could have proved them, or will be able to do so on another trial, it is not for the court to say, or even to conjecture. All that we can do, is to give the defendants an opportunity of verifying their assertions. I am of opinion that the evidence ought to have been admitted, and therefore the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE, 28, 1826.]

HILL *against* WILLIAMS.

86 PR

IN ERROR.

Under the "supplement to the act for preventing clandestine marriages," passed the 14th of *February*, 1729-30, only one penalty of fifty pounds can be recovered against a justice of the peace for joining two persons in marriage; and, if the parent of one party has already recovered the penalty, no action can be maintained for it by the parent of the other party.

ERROR to the Common Pleas of *Susquehanna* county.

On the trial of this cause, in the court below, several bills of exceptions were tendered by the counsel for the defendant below, the plaintiff in error, to the opinion of the court, in permitting the plaintiff to amend his declaration, in the rejection of testimony offered by the defendant below, in refusing to permit the defendant to amend his pleas, and in the answer given to a question of law submitted for their opinion, by the counsel for the defendant.

The questions raised by the record were argued by *Conyngham* and *Mallory* for the plaintiff in error, and by *Case* for the defendant in error; but the court having decided one point only, which is fully stated and explained in the opinion which follows, a statement, either of the circumstances of the case, or the arguments of counsel, would be superfluous.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an action of debt, brought by *John Williams*, the plaintiff below and defendant in error, against *James A. Hill*, a justice of the peace for the county of *Susquehanna*, for the penalty of fifty pounds, for marrying his son, an infant, called *Palmer Williams*, to a certain *Electa Nickerson*, without the

(Hill v. Williams.)

knowledge or consent of the plaintiff, contrary to the act of assembly, entitled, "A supplement to the act for the preventing clandestine marriages," passed the 14th of *February*, 1729-30, 1 *Sm. L.* 180. The fact was, that both *Palmer Williams* and *Electa Nickerson* were infants at the time of the marriage; and before the commencement of this suit, the father of *Electa Nickerson* had brought an action against the defendant, and recovered of him the penalty of fifty pounds; so that the question is, whether, under the act of assembly, the defendant is liable to two penalties of fifty pounds. By the original act, passed in the year 1700, 1 *Sm. L.* 21, to which the act which inflicts the penalty of fifty pounds is a supplement, if any person should presume to marry, or be a witness to any marriage, without a previous publication of the intent to marry, the person married was subject to a forfeiture of twenty pounds, to the proprietary and governor, and every witness present at such marriage, to a forfeiture of five pounds, and to damages to the party grieved, to be recovered in any court of record. The supplement recites, that the original act "had been very much eluded, by reason that no proper penalty is, by the said law, imposed on the justice of peace, or other persons, marrying, or joining in marriage any persons, contrary to the intent and meaning of the said act." The first section enacts, that no justice shall sign his name to the publication of any marriage, unless at least one of the persons intended to be married, lives in the county where the justice dwells, "and unless such justice shall likewise have first produced to him, a certificate of the consent of the parent or parents, guardian or guardians, master or mistress of the persons whose names or banns are to be so published, if either of the parties be under the age of twenty-one years, or under the tuition of their parents, or be indented servants." And, by the second section, "if any justice of the peace shall take upon him to join in marriage any person or persons, or if any justice of the peace shall be present at, and subscribe his name as a witness to any marriage, without such publication being first made as aforesaid, every justice of the peace so offending shall, for every such offence, forfeit the sum of fifty pounds, to be recovered in any court of record, by the person or persons grieved, if they will sue for the same." The third section contains a proviso, in the case of persons who shall be married according to the ceremonies of the religious societies to which they belong, not affecting the present question. It appears to me, that the act of the justice in marrying any persons, or signing his name to the publication of their names, contrary to the provisions of the law, is the offence on which the penalty is inflicted, and that this is but one offence, although two persons are joined in marriage, and the parents of each party may be grieved by it. The object of the law was not so much to make a compensation to the injured parents, (for in many cases fifty pounds would be no compensation,) as to deter

(Hill v. Williams.)

all persons from being accessory to these clandestine marriages. For this purpose a certain penalty was thought to be the best remedy, and a penalty in money being inflicted, no person was so proper to receive it as the party grieved, if he thought it advisable to sue for it. But, if he declined suing for the penalty, I see nothing to hinder him from suing for damages under the original act. Penal laws should be held to a strict construction, and it certainly would require very clear expressions to double the penalty. The argument in favour of a double penalty, is founded on the expressions in the second section, "he shall forfeit the sum of fifty pounds, *to be recovered by the person or persons grieved.*" But what is to be recovered? The sum of fifty pounds, and no more, for no other sum is mentioned. The word "*persons*" is often applicable to one party. For instance, a minor may have several guardians, or several masters who are in partnership. In such cases, all the guardians, or both the masters, may bring suit as one party. But if the word *persons* is applied to a case like the present, where the parents of both man and woman are grieved by the marriage, it is much more reasonable to say that both may join in the action and share the penalty, than that the justice shall pay one hundred pounds, where the law has said that he shall pay fifty pounds. In the case of *Jones v. Estis*, 2 Johns. 379, it is said, that a penalty cannot be raised *by implication*, but must be *expressly created and imposed*. And, in another case, *Washburn qui tam v. M'Elroy*, the strong inclination of the Supreme Court of *New York* against multiplying penalties, is manifested. It was enacted, by a statute of *New York*, that if any person shall sell spirituous liquors by retail, without a license, or if any person shall sell, &c., to be drunk at his house, without having entered into a recognizance, (such as is prescribed) every person who shall be guilty of either of the offences aforesaid, shall, *for each offence*, forfeit twenty-five dollars. It was held, that only one penalty of twenty-five dollars could be incurred *for each of these two offences*, although it was proved that the offender had sold spirituous liquors to five several persons, at several times. But my opinion, in the present case, is not founded so much on authorities, as on the intent of the act of assembly, which, after all, must govern us. The joining two persons in matrimony is but one act, and one offence, on which only one penalty of fifty pounds was intended to be imposed. The judgment of the Court of Common Pleas, therefore, which was in favour of the plaintiff, was erroneous and should be reversed.

Judgment reversed.

[SUNBURY, JUNE 28, 1826.]

JACKSON *against* CRAWFORD.

IN ERROR.

B. being indebted to C., and J. to B., and J. having a judgment against L., an arrangement was made between C., B., and J., in pursuance of which J. assigned his judgment against L. to C., and B. delivered up to J. one of his bonds to him, and indorsed a receipt on another of his bonds for a sum amounting to the difference between the bond delivered up, and the judgment against L., assigned by J. to C.; J. having refused to assign the judgment, unless this was done. There was no written guarantee of the assigned judgment, nor any express promise by J., either to B. or to C., that, in case the money could not be recovered from L., he would be responsible. L. proved insolvent, in consequence of which C. brought suit against J. *Held*, that the law raised no duty from J. to C., by which the suit could be supported.

THIS was an action on the case, brought in the Court of Common Pleas of *Huntingdon* county, by *John Crawford*, the defendant in error, against *William Jackson*, the plaintiff in error, who was defendant below. It appeared, by the evidence attached to the record, that *Crawford* had a debt due to him from a certain *John Beatty*, to whom a debt was due from the defendant *Jackson*, who had obtained a judgment against *Gershom Lambert*. An arrangement was made between *Crawford*, *Beatty*, and *Jackson*, in pursuance of which *Jackson* assigned his judgment against *Lambert*, to *Crawford*, and *Beatty* delivered up to *Jackson* one of his bonds to him, and indorsed a receipt on another of his bonds for a sum amounting to the difference between the bond delivered up, and the judgment against *Lambert* assigned by *Jackson* to *Crawford*. There was no guarantee of the assigned bond, in the written assignment, and so the President of the Court of Common Pleas instructed the jury. Neither was there any express promise of *Jackson*, either to *Beatty*, or to *Crawford*, that in case the money should not be recovered against *Lambert*, he would be responsible. *Lambert* proved insolvent, in consequence of which *Crawford* brought this suit against *Jackson*. The charge of the President of the Court of Common Pleas, which was excepted to by the counsel for the defendant, contained the following paragraph:—

“There is another point of view, in which this case has been presented. *Beatty* had *Jackson's* bonds. *Crawford* procured *Beatty* to deliver up one bond, and put a receipt on another,—this in *Jackson's* presence;—nay, he agreed to it,—and more, he would not transfer the judgment until this was done. *Does this raise a duty from Jackson to Crawford, which would support a suit, without an express promise?—And, in the opinion of the court, it does.*”

Smith and *Potter*, for the plaintiff in error.

Blanchard and *Hale*, for the defendant in error.

(Jackson v. Crawford.)

The opinion of the court was delivered by

TILGHMAN, C. J. It was hard on *Crawford* to lose his debt, and therefore the court was naturally inclined to favour him. I feel the same disposition myself, but am restrained by the old adage, that from hard cases spring bad precedents. If *Jackson* had been indebted to *Crawford*, when he assigned him the judgment against *Lambert*, I should agree that the assignment of the judgment would be no satisfaction of the pre-existing debt, unless it was so understood by the parties. But here was no antecedent debt. The arrangement between *Crawford*, *Beatty*, and *Jackson* was all one transaction, of which the assignment of the judgment against *Lambert* formed a part. *Jackson* was no way implicated in the debt due from *Beatty* to *Crawford*. He assigned his judgment against *Lambert*, for which he received value by the extinguishment of his own debt to *Beatty*. And *Crawford*, if he released *Beatty*, of which I am not informed, received value by the assignment of *Jackson's* judgment against *Lambert*. For any thing that appears, he was satisfied with this assignment, for better for worse, since he asked no guarantee, or promise of any kind from *Jackson*. It seems to have been the opinion of the Court of Common Pleas, that previous to the assignment of the judgment, *Jackson* had put himself in the place of *Beatty*, and promised the payment of his debt to *Crawford*. Had this been so, the charge would have been correct. But it is not pretended, that he did this expressly, and I cannot perceive on what ground the law should imply it. It is stated that *Jackson* refused to make the assignment, until *Beatty* discharged him. But this he might well do, without taking upon himself the payment of *Beatty's* debt. *Crawford* procured a discharge of *Jackson's* debt to *Beatty*, in consideration whereof, *Jackson* assigned to him his judgment against *Lambert*. This assignment was made in writing, and as the writing contained no guarantee, and there is not said to be any evidence of an express promise, I am of opinion that the law raised no duty from *Jackson* to *Crawford*. This case was before us on a writ of error once before. I have examined the opinion then given, and it really does appear to me, that the point now in question was decided in favour of the defendant.* I am of opinion, therefore, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

* See 12 *Serg. & Rawle*, 165.

[SUNBURY, JUNE 28, 1826.]

IRVINE and others *against* KEAN.

IN ERROR.

It is good cause of challenge to a juror, that he objects himself to being sworn, because he had heard all the evidence at a former trial of the cause, and had made up and expressed his opinion on the facts then given in evidence, but says, that his mind is always open to conviction on another state of facts.

WRIT of error to the Court of Common Pleas of *Centre* county, in an action brought by the plaintiffs in error against the defendant in error.

Blanchard and *Hale*, for the plaintiffs in error, cited, in reference to the question decided by this court, 1 *Johns.* 316. *McCorke v. Binns*, 5 *Binn.* 351. *Co. Litt.* 157, *b.* *Bull. N. P.* 307.

Potter, contra, cited, 1 *Trials per Pais*, 189. *Hawk. Ch.* 43, *sect.* 28, 29. 3 *Bac. Ab.* 758. 1 *Burr's Trial*, 44, 419, 420. 1 *Chitty's Crim. Law*, 441. 8 *Johns.* 445.

PER CURIAM. There is but one exception in this case which appears to the court to be of any weight. The admission of *Jacob Cramar* as a witness was right, and the charge of the President of the Court of Common Pleas, to the jury, was correct. But the plaintiffs challenged *Francis McEwen*, a juror, who being called, objected himself to being sworn, "because he had heard all the evidence at the former trial, and had made up and expressed his opinion on the facts then given in evidence, but said, that his mind was always open to conviction, on another state of facts." The court overruled the challenge. This juror, if he had been on the former jury, would have been liable to a challenge, yet, in that case, his mind might have been open to conviction, if different evidence had been given on the second trial. But the law presumes that a man who has once made up his mind, especially if he has delivered it to others, will not be perfectly impartial. The presumption is a safe one, and generally accords with the truth. In the present case, it was impossible to say, whether any new evidence would be given; and therefore, from the juror's own account of the state of his mind, it would have been hazardous to permit him to be sworn. It is objected, that if this rule prevails, it will be difficult to procure a jury in any case which has been the subject of much conversation, because every man forms some opinion upon the state of facts which he has heard. It is very true, that men generally form an opinion upon the case as it has come to their knowledge; but, when that knowledge is derived from common report, any sensible man knows the uncertainty of such reports, and keeps his mind open to a change of opinion when the whole truth shall be ascertained. Upon this principle, it was held by the Supreme Court of *New York*, 8 *Johns.* 445, to be no

(Irvine and others v. Kean.)

cause for challenge, that the juror had said, "if the report of the neighbours was true, the defendant was in the wrong." The case before us is very different, where there had been a former trial, in which it must be supposed that all the evidence in the power of the parties had been produced. On the trial of *Aaron Burr*, Chief Justice MARSHALL laid down the rule, "that to have made up and delivered an opinion, that the prisoner entertained the treasonable designs with which he was charged, and that he retained those designs and was prosecuting them, when the act charged in the indictment was alleged to have been committed, was good cause of challenge." (1 *Burr's Trial*, 419, 420.) It is the opinion of the court, that after the impression made on the mind of *M^r Ewen*, by the first trial, there was danger of his no longer being perfectly impartial; and it being altogether uncertain whether the state of the facts would be altered on the second trial, the plaintiff's challenge ought to have been allowed. The judgment is therefore to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 28, 1826.]

FREDERICK against CAMPBELL.

IN ERROR.

In an action on a bond given for the price of a tract of land, which by articles of agreement the plaintiff had contracted to sell to the defendant, and was said to contain two hundred and twenty-five acres, and for which a deed was afterwards executed, conveying the tract by metes and bounds, and calling it two hundred and twenty-five acres, but it turned out to be deficient in quantity, the defendant may prove, that, at the execution of the articles of agreement, the plaintiff asserted that the tract would be found to contain two hundred and twenty-five acres, and called on the bystanders to witness that he would make his assertion good.

If to the proposition, that parties are bound by their own construction of a contract at the time it is finally executed, the court answer, that the proposition is generally true, but that fraud is alleged, and, if found by the jury, the written evidence in relation to the contract is not conclusive, it is not error.

Nicholas Frederick, the plaintiff in error, brought this action of debt in the Court of Common Pleas of *Mifflin* county, against *John Campbell*, the defendant in error, upon a bond given by the latter to the former, dated the 2d of *April*, 1812, conditioned for the payment of two hundred pounds on the 1st of *April*, 1817. The consideration of this bond was part of the purchase money of a tract of land, which *Frederick*, by an article of agreement, bearing date the 28th of *November*, 1811, had contracted to sell to *Campbell*, for the sum of one thousand six hundred pounds, and which was stated in the article to contain two hundred and twen-

(Frederick v. Campbell.)

ty-five acres and allowance. In pursuance of this agreement, a deed by *Frederick* and wife to *Campbell* was executed on the 2d of *April*, 1812, which described the tract by metes and bounds, and as containing two hundred and twenty-five acres, and allowance of six *per cent.* for roads, be the same more or less. On a survey being made, it turned out that the whole tract contained but two hundred and five acres and fifty-five perches.

In the course of the trial the defendant offered to prove, by the testimony of a witness, that *at the execution of the article of agreement*, *Frederick* said there were two hundred and twenty-five acres in the tract; that he engaged to get it surveyed; that he obligated himself verbally that there was that quantity, and called on the witness to attest his declaration. To this evidence the counsel for the plaintiff objected. The court admitted the evidence, and an exception was taken to their opinion.

The witness proved the facts offered in evidence, and added that he thought, though he would not speak with certainty on the subject, that at the execution of the deed, as well as at the execution of the article of agreement, a survey of the tract was spoken of.

After the charge to the jury had been delivered, the counsel for the plaintiff propounded to the court, for their opinion, several propositions, and excepted to the opinion given upon the third proposition.

This proposition was as follows: "In the absence of all fraud, the parties are bound by their own construction, which they put upon their own contract, at the time it was finally executed; as was done in this case, by executing and accepting the deed, bonds, and mortgage."

The answer of the Court was in these words: "These points are proposed, with singular want of point. They are all abstract propositions, applicable to this case, if there were nothing before the jury but the writings. This cause does not depend on the writings alone, but on them and the parol evidence. The above proposition is generally true; but fraud is alleged here, in more than one respect, and, if found by the jury, then the deed and bonds and mortgage, are not conclusive."

Blythe and *Hale*, for the plaintiff in error, contended, that there was error in admitting parol evidence of what passed at the execution of the articles of agreement, in pursuance of which the plaintiff afterwards gave a deed for the land to the defendant. This they considered as contrary to the opinion of the Supreme Court, when this cause was before them, and the judgment reversed, at *June Term*, 1825. Judge DUNCAN, in delivering the opinion of the court, then said, he would confine the parol evidence to the time of the execution of the deed of conveyance and the bonds * The deed being the consummation of the agreement, the previous arti-

* See 13 *Serg. & Rawle*, 136.

(Frederick v. Campbell.)

cles were merged in the conveyance. *Crotzer v. Russel, Executor*, 9 *Serg. & Rawle*, 78. *Share v. Anderson's Executors*, 7 *Serg. & Rawle*, 43. 10 *Johns*. 297.

2. The court erred in leaving it to the jury to decide, according to the agreement of the parties appearing by the writings and the parol evidence, although there might be no fraud in the plaintiff.

Potter, for the defendant in error. Parol evidence of what passed at the execution of the articles of agreement, was given at a former trial of this cause and exception taken, and the judgment was not reversed on that exception. The evidence was proper to show that the plaintiff had always asserted, that there were twenty acres more than there actually were, in consequence of which the defendant accepted a deed and gave his bonds for the price of twenty acres more than he obtained. The case of *Share v. Anderson* is not to the point. There was, in that case, no allegation of fraud; but, in the case under consideration, the fraud of the plaintiff was the ground on which the defendant relied. The misrepresentation of the plaintiff, who knew the real quantity, was a fraud; and evidence of this misrepresentation, previous both to the execution of the articles of agreement and the deed of conveyance, was therefore admissible.

The opinion of the court was delivered by

GIBSON, J. The plaintiff relies on two points,—that the court erred in admitting evidence of what passed at the execution of the articles, and in their direction on the third point, proposed at the trial.

It is said that no antecedent proposition ought to have been admitted to vary or explain the conveyance which was the final accomplishment of the intention of the parties; and it cannot be denied that if the evidence had been offered for that purpose, it would have been incompetent. But the consideration of the bond on which suit is brought, is the price of a tract of land which turns out to be deficient in quantity; and it is alleged that the defendant was drawn into the purchase by a misrepresentation of that material fact. He was admitted to prove, that at the execution of the articles, (and, as the witness thinks, at the execution of the conveyance,) the plaintiff asserted that the tract would be found to contain two hundred and twenty-five acres, and called on the bystanders to bear witness that he would make his assertion good. It is immaterial that he may not have known this to be false: if he affirmed what he did not know to be true, he was guilty of a fraud, which is a distinct head of equitable relief. The tendency of the assertion was to prevent the defendant from having the quantity ascertained by a survey, which he might otherwise have done; and if he in fact reposed on the representation of the plaintiff, it is obvious that he has suffered an injury which ought to be compensated by a deduction from his bond. But how is a party to show that

(Frederick v. Campbell.)

a deception has been practised in the beginning of a transaction, and the delusion kept up through the whole course of it, but by showing the circumstances in the order in which they occurred? On principles of reason, the competency of the evidence is plain, and it is beside sustained by the decision of this court in *Stubbs v. King*, recently decided at *Lancaster*.*

The objection to the charge—that the jury were left to decide according to the contract, as it should appear by the writings and *parol evidence*, though they should be of opinion that no fraud was proved—is founded on an assumption of what is not true in fact. The counsel prayed the court to charge, that, in the absence of fraud, the parties would be bound by the construction which they gave the contract when it was consummated; and the jury were directed that the proposition, although true in the abstract, was inapplicable to the state of the case as it appeared on the evidence, fraud being alleged in more respects than one. In truth, the defence was put exclusively on the existence of fraud, without which it was not pretended that it could be made out. A party is not entitled to the direction of the court, on any point that does not necessarily arise out of a state of facts which the evidence may produce. But here the plaintiff actually had an expression of the court's opinion in favour of his abstract position; and it was therefore indispensable to instruct the jury, that it was irrelevant to any facts that might result from the evidence; and in this also there was no error.

Judgment affirmed.

[SUNBURY, JUNE 28, 1826.]

M·DOWELL and another *against* COOPER and others,
Administrators of MITCHELL.

IN ERROR.

The vendee of a tract of land, to whom a deed has been executed, and who has given a bond and mortgage for the purchase money, is presumed, in the absence of evidence to the contrary, to have accepted the deed; and, in an action on the bond, he is not entitled to an abatement, on account of a small deficiency afterwards discovered in the quantity of land conveyed.

On a writ of error to the Court of Common Pleas of *Mifflin* county, it appeared that this was an amicable action of debt, in which *John M·Dowell* and *Robert M·Clelland* were plaintiffs, and *Robert Cooper*, *James Chriswell*, and *David Mitchell*, administrators of *William Mitchell*, deceased, defendants, to recover the balance due upon a bond given by the defendants' in-

* *Ante*, page 206.

(*McDowell and another v. Cooper and others, Administrators of Mitchell.*)

testate to the plaintiffs, dated the 29th of *March*, 1813, and conditioned for the payment of six hundred and forty-five dollars and fifty cents, on the 1st of *April*, 1818.

This bond was given for part of the price of a tract of land, which the plaintiffs, by articles of agreement, dated the 19th of *February*, 1812, contracted to convey to the said *William Mitchell*, and which was described as containing four hundred and twenty-nine acres and ninety-nine perches. On the 29th of *March*, 1813, a deed was executed by the vendors, conveying the premises contracted for, by courses and distances, and describing them as containing the same number of acres as were mentioned in the articles of agreement. Bonds for the purchase money, together with a mortgage, were on the same day given to the vendors by the vendee, to whom the deed was delivered, for the purpose of being recorded. It was recorded on the same day. The title papers were afterwards given to *McClelland*, to enable him to obtain a patent in the name of *Mitchell*, and a patent was obtained on the 15th of *December*, 1815. It did not appear that either *Mitchell* or his representatives had ever been in possession of the patent; but it was proved, that *Mitchell* had often said, that he would not lift the papers until all the money was paid; and when they were offered to him he said, that he believed they were as safe in *McClelland's* hands as in his own.

On a survey being made, on the 15th and 16th of *December*, 1819, in pursuance of the directions of an inquest, on a writ of partition between this and other lands, it was discovered that the tract conveyed by the deed of the 29th of *March*, 1813, contained only four hundred and twenty acres and one hundred and thirty-seven perches; and, on this ground, the defendants claimed an abatement from the bond upon which this suit was brought, in proportion to the deficiency in the quantity of land conveyed to their intestate.

The President of the Court of Common Pleas, charged the jury as follows:—

“As you have heard that this cause was tried before, and the opinion of the Supreme Court has been read, I shall only tell you, that the opinion of the Supreme Court is conclusive on this court and you. This, however, is only the case where the facts are the same. It is alleged, that they are different here from what appeared to the Supreme Court. There was no return of survey in the office, at the time of the sale, embracing exactly the land sold. There was of one tract; but of part of the other, the return appears to have been made in *November*, 1815.

“There was no patent when the deed was made, nor for two and a half years afterwards. The deed and patent, to this hour, are in possession of the plaintiffs. The defendant gave his bonds and mortgage. Why he did not first accept the deed and then the patent, the parties differ. [*His Honour here read the evidence.*]

(McDowell and another v. Cooper and others, Administrators of Mitchell.)

“Two cases in the Supreme Court, *Crotzer v. Russell*, (9 *Serg. & Rawle*, 78,) and this case, (13 *Serg. & Rawle*, 143,) settle the law in one respect. But if you believe that *Mitchell* was never satisfied; that he would not and did not accept these papers, because something was still remaining to be done, it leaves the articles in full force; and, if you believe *Robinson*, there is a deficiency of eight acres, for which the defendant is to have an allowance. But if you believe the deed was in effect received at the time the bonds were given, and both parties then considered all settled, the matter ought not to be opened.”

The counsel for the plaintiffs excepted to the opinion of the court.

Hale, for the plaintiffs in error, observed, that the judgment in this case had been reversed by the Supreme Court, and a *venire de novo* awarded. The same, or nearly the same evidence, had been given on the second trial, and the cause has come up again. The court below ought to have charged the jury according to the opinion of the Supreme Court; instead of which, they erroneously left it to the jury to decide, whether *Mitchell* had accepted the conveyance from the plaintiffs, notwithstanding he gave them his bonds, accompanied by a mortgage. The court, moreover, charged positively, that, if the jury believed *Robinson*, who proved that the land fell short eight acres, the defendants were entitled to an allowance for the price of the eight acres.

Potter, for the defendants in error, contended, that the court below did not go in opposition to the opinion of this court. The judge told the jury, that if *Mitchell* accepted the deed from the plaintiffs, and the parties considered the transaction as settled, the plaintiffs were entitled to recover. But the defendants contended that the deed was not accepted, but retained by the plaintiffs in order to procure a patent; and, until the patent was obtained, the business was not closed. The defendants gave some evidence that the deed was not accepted, and whether it was or not the jury were the proper persons to decide. The deed was made to *Mitchell*, in order that a patent might be taken out in his name. The fact of acceptance was fairly submitted to the jury, and they have found for the defendants.

The opinion of the court was delivered by

DUNCAN, J. This case comes up again, I think, in no material respect different. The deficiency of eight acres in a survey of four hundred and twenty-nine acres, is no more than a purchaser may reasonably expect. It is, however, unnecessary to decide, whether on articles executory the vendee would not be entitled to a deduction for this deficiency in an action on the articles, for that is not this case. It is an action of debt on the bond, where a conveyance had been accepted and bonds and mortgage given for the purchase money. There was nothing to be left to the jury. The bonds and

(*M'Dowell and another v. Cooper and others, Administrators of Mitchell.*)

mortgage prove the acceptance of the conveyance. The man who executes a mortgage to the vendor for the payment of the purchase money, must be presumed to have accepted the conveyance. There was nothing in the parol evidence to rebut this presumption—no allegation of fraud or concealment, or refusal to accept, or conditional acceptance. The parol evidence fortified the presumption. It was, that the conveyance was delivered to *Mitchell* the day it was executed, to be recorded, and that it was recorded accordingly; *Mitchell* declaring he would not lift the papers until the money was all paid, and, on the same day, he gave the bonds and mortgage. All were simultaneous acts. The conveyance, after being recorded, was given to the vendors to enable them to take out the patent in *Mitchell's* name, which was done accordingly. *Mitchell* did not refuse to receive back the papers on account of any deficiency in quantity or quality, for it was not then known, or any defect of title, for there was none; but because, (and it is the reason assigned by himself,) *he thought they would be as safe in M'Clelland's hands as his own.* And they were so, for the conveyance was recorded, and the patent stood in his own name. If *Mitchell* was entitled to an abatement *pro rata* of these eight acres, I can see no good reason why, if he had received the money, he might not recover it back, when, at any time thereafter, the discovery should be made, or why, if there was this small surplus, *Mitchell* might not be compelled to pay for it. If the law was so, it would prove a source of great disquietude and litigation. It is not so. The articles had discharged their office when the conveyance was accepted, and the bonds and mortgage given. There being no warranty as to quantity, the quantity would be matter of description, not a covenant that the described land should contain the exact quantity to one acre or to eight acres, in a conveyance of four hundred acres. I do not speak of a deficiency to a great amount, entering from its magnitude into the very heart and essence of the contract; but these small quantities, deficient or exceeding, the deficiencies or surplus, which both parties, vendor and vendee, might naturally expect. The discovery of a deficiency was not until seven years after the sale and possession, six years after the conveyance and mortgage, more than fifteen months after the last instalment became due, and six months after the greatest part of that instalment had been paid, and was made on a survey directed by a jury, or inquest on a writ of partition, and on running a line between this and other lands. I therefore think there was error in the court leaving it to the jury to decide whether there was any thing, any fact in the cause trying, to make it an exception from the general rule of law, that the conveyance and bonds conclude the parties; because there was no evidence of any fact which could vary it from the common case, of the execution of the articles by accepting a conveyance and giving bonds and mortgage; any thing which would

(*M^cDowell and another v. Cooper and others, Administrators of Mitchell.*)

leave the articles in full force, and thereby entitle the purchaser, in an action on the bonds, to an allowance for these eight acres, to be deducted from the bond, in the same manner as he might be in a suit on the articles.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE, 28, 1826.]

M^cDOWELL against TYSON and others.

IN ERROR.

In an action by A., the defendant cannot set off an account for goods sold to A. and B. as partners.

WRIT of error to the Court of Common Pleas of *Mifflin* county.

The cause was argued, in this court, by *Potter* and *Hale*, for the plaintiff in error, who cited, *Wilson v. Wallace*, 8 *Serg. & Rawle*, 54, 55. *Lloyd v. Arbuckle*, 2 *Taunt* 324. *Childerston v. Hammon*, 9 *Serg. & Rawle*, 68. *Lewis v. Culbertson*, 11 *Serg. & Rawle*, 48. *Ex parte Quinton*, 3 *Ves., jr.* 48. *Leveck v. Shaftoe*, 2 *Esp. Rep.* 468. 2 *Selw. N. P.* 1103. And by

M^cDowell and *Alexander*, for the defendants in error, who cited, *Coope v. Eyre*, 1 *H. Bl.* 37. *Dale v. Cook*, 4 *Johns. Ch. R.* 13. *Henderson v. Lewis*, 9 *Serg. & Rawle*, 383. 5 *Cranch*, 34, 39. 10 *East*, 418. 1 *Atk.* 100. 8 *Durn. & East*, 69. 1 *Johns. Cas.* 169. 2 *Serg. & Rawle*, 394.

The opinion of the court was delivered by

ROGERS, J. This was an action of debt on book account by *William Tyson*, *Nathan Tyson*, and *Charles M. Poor*, merchants, trading under the firm of *Tyson and Co.*, against *John M^cDowell*. The defence relied on, was an allegation of a partnership between *Tyson and Co.*, and *Byrnes and Co.*, in the purchase of flour in the fall of 1816; and, that the defendant had furnished flour to those companies, as partners, to the amount of four thousand dollars, which he offers to allow and set off against the plaintiffs, to the full amount of their debt and damages. The only material inquiry is, whether, admitting the partnership, this demand of *John M^cDowell* against the firms of *Tyson and Co.* and *Byrnes and Co.*, be the proper subject of set off in this suit. This action is brought to recover a demand of the firm of *Tyson and Co.*, for a debt contracted by *M^cDowell*, without a reference to the alleged partnership with *Byrnes and Co.* If a partnership did actually exist, there is nothing to prevent *M^cDowell* from commencing suit against them, and recovering his debt. In that case, *Byrnes* and

(M'Dowell v. Tyson and others.)

Co., if able, would be compelled to pay their share of the debt. Is it however, the subject of set off? I do not think that it is, because there is a want of that mutuality which the law requires; for mutuality of debts is the essential circumstance of a set off. 1 *Binn.* 64.

In the course of the argument, a great deal of matter has been pressed into the case which does not fairly arise. The first, whether *Isaac Tyson* was a dormant partner, does not appear to have been made; and wretched indeed would be the administration of justice, if this court should reverse a judgment for an error, which the judge who tried the cause did not commit.

After an attentive consideration of the evidence, I cannot perceive how the withdrawal of *Isaac Tyson* from the partnership of *Tyson* and Co., enters into the merits of this case. Had the question fairly arisen, it would have been well worthy of inquiry whether the same rule does not apply to set off, as to an original suit, and whether, in that case, the withdrawal of *Isaac Tyson* from the firm of *Tyson* and Co., should not have been distinctly alleged on the record.

It may be sufficient to observe, that the evidence of the withdrawal of *Isaac Tyson* was offered and received, as a memorandum, regularly executed and attested, and not as an entry in the books of *Tyson* and Co.

Judgment affirmed.

[SUNBURY, JULY 5, 1826.]

IVES and others *against* LEET and others.

IN ERROR.

One verdict and judgment, and one award of arbitrators, under the act of the 20th of *March*, 1810, in favour of the same party, are not a bar to another ejectment by the other party.

On the return of a writ of error to the Court of Common Pleas of *Tioga* county, it appeared, that this was an action of ejectment, brought by *John Ives* and others, the plaintiffs in error, against *Thomas Leet* and others. On the trial of the cause, in the Court of Common Pleas, it was proved by the defendants, that, in a former ejectment for the same land, in which they were plaintiffs, and the present plaintiffs were defendants, a verdict and judgment had been given for them, (the now defendants,) and that afterwards the now plaintiffs brought an ejectment against them, which was arbitrated under the compulsory arbitration act; and a report returned and filed in the prothonotary's office, in favour of the defendants. From this report, the plaintiffs appealed to the Court of Common Pleas, where they suffered a nonsuit. On this evidence,

(Ives and others v. Leet and others.)

the Court below instructed the jury, that the plaintiffs' action was barred by the act of the 13th of *April*, 1807, (4 *Sm. L.* 476,) and the counsel for the plaintiffs excepted to their opinion.

Lewis, for the plaintiffs in error. By the act of the 13th of *April*, 1807, (*Purd. Dig.* 204,) two verdicts and two judgments in ejectment are conclusive; but the defendants, having had only one verdict and judgment, and one award of arbitrators, from which an appeal was entered by the plaintiffs, who afterwards suffered a nonsuit, the case does not fall within the meaning of the act of assembly. This act is in derogation of the common law, which does not restrain the bringing of actions of ejectment. An injunction has been refused in equity against a plaintiff in ejectment, after having failed in five suits. 2 *Eq. Ab.* 243. The letter of the law should therefore be adhered to, and no equitable construction admitted. 4 *Bac. Ab.* 650. *Hammond v. Webb*, 10 *Mod.* 282. 3 *Leon.* 133. 4 *Dall.* 64. *Johnson v. Blaines's Lessee*, 3 *Binn.* 103. It is clear, that the case is not within the words of the law; nor is it within its spirit, because, however unjust and illegal the proceedings of the arbitrators may have been, there can be no redress, unless an error appears on the face of the award. In a proceeding under the compulsory arbitration act, a landholder residing at a distance, is subjected to the greatest difficulties. Arbitrators are chosen after fifteen days' notice, a period scarcely sufficient to enable the tenant to give notice to his landlord, whose case must often be heard under great disadvantages. Nor is there any remedy for the evil. Where there has been an erroneous verdict, the whole matter may be reviewed by the court, on a motion for a new trial; but this species of relief is not open to one who has been aggrieved by an award of arbitrators. The cases of a verdict and an award are not parallel. A report of referees, under the act of 1705, may perhaps be equivalent to a verdict, because the act of assembly expressly puts it on the footing of a verdict. But it is to be remembered, that such a reference is voluntary, and no judgment is entered on the report, until it has been approved by the court, and if the proceedings have been against law, or even if there has been a manifest mistake in point of fact, the court will not confirm it.

Williston and Mallary, for the defendants in error.

The question is, whether a report of the arbitrators is equal to a verdict and judgment, under the act of the 13th of *April*, 1807. The object of the act of assembly was to make an end of ejectments after two trials, and it is immaterial whether these trials be by juries or by arbitrators. The act of *March*, 1810, gives to an award of arbitrators the effect of a judgment, and makes it a lien upon real estate. The judgment, therefore, has precisely the same force in other respects as if it had been entered on a verdict, and no good reason can be given why it should not operate in the same manner upon the rights of a plaintiff in ejectment.

(Ives and others v. Leet and others.)

The opinion of the court was delivered by

TILGHMAN, C. J. When the plaintiffs suffered a nonsuit on their appeal, the report of the arbitrators remained in full force, and had the effect of a judgment. The question is, then, whether one verdict and judgment, and one report of arbitrators in favour of the same party, be a bar to another ejectment by the other party? The act of assembly on which the case depends (section 4,) is in the following words: "Where two verdicts shall, in any writ of ejectment, between the same parties, be given, in succession, for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but where there may be verdict against verdict, between the same parties, and judgment thereon, a third ejectment in such cases, and a verdict and judgment thereon, shall be final and conclusive, and bar the right." This section is drawn with great care and caution, because the object was, to deprive one of the parties in ejectment of a right which had been enjoyed before, of bringing a third ejectment, after the loss of two verdicts and two judgments. The intention is clearly expressed, that to bar the right there must not only be two verdicts, but a judgment on each of them, and not only two judgments, but a verdict preceding each of them. A judgment by default would not be within the meaning of the law, because such judgments are rendered without any trial, and the right was not to be barred unless the cause was twice decided by a jury. A jury trial gives each party an opportunity of introducing the merits of his case, and, in general, verdicts are founded on the merits. But the defendants rely on the act of the 20th of March, 1810, 5 Sm. L. 131, by which either party may compel the other to submit the cause to arbitrators, whose report, (by the tenth section of the act,) when entered on the docket of the prothonotary, *has the effect of a judgment*. Is this equal to a *judgment on a verdict*? It is not within the words of the act of April, 1807, because there has not been a *verdict* and a judgment thereon. Then why should this court construe the act *by equity*, for the purpose of barring a common law right? Nothing, certainly, could justify such a construction, but the manifest spirit of the law. Now, it appears to me that the report of arbitrators is not, in spirit, by any means equal to a verdict and judgment. An arbitration, under the act of 1810, is *forced* upon the party, and the arbitrators decide both fact and law, without the assistance of the court. Neither, when their report is once returned, can they be requested to reconsider it. Nor is there any opportunity of correcting errors, to which the best and most intelligent men are subject. A writ of error does indeed lie on the report of arbitrators. But, as you are confined to errors appearing on the record, if the award is good on its face, there is no chance for redress, the proceedings before the arbitrators not being entered of record. They may have fallen into the grossest errors, and yet nothing is seen of them. How different is the case of a verdict

(Ives and others v. Leet and others.)

and judgment! Before the jury retire to consider the cause, they hear the arguments of counsel, and receive instructions from the court in all matters of law. And if the court errs in the admission or rejection of evidence, or in its opinion on any point of law, the mistake may be corrected by a superior tribunal. And, besides, on a motion for a new trial, if it appear that either court or jury have been wrong on the first impression, which is often the case, the cause may be submitted to another jury, when the matter being more fully canvassed and understood, there is the strongest probability of a proper decision. I am quite clear, therefore, that the report of arbitrators, under the act of 1810, cannot be considered as equal to a verdict and judgment, under the act of *April*, 1807. I give no opinion on the effect of an award of referees under the act of 1705, (1 Sm. L. 49,) and a judgment entered thereon. It is different from the case before us, because the act of 1705 expressly enacts, that the award "*being approved of by the court, and entered on the record, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men.*"

I am of opinion, that the judgment in the present case should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 5, 1826.]

WEAVER *against* M'CORKLE, for the use of BOYD.

IN ERROR.

M., being the holder of a bond against W., assigned it equitably to B., who gave notice of the assignment to W., the obligor, who acknowledged that it was a just bond, and promised to pay it, deducting certain credits to which he was entitled. It was agreed, that these credits should be adjusted between B. and W., and W. was warned to pay no other person than B. At the time of the assignment, B. gave to M. a writing, stating that there appeared to be due to M. on the bond, two hundred and fifty-seven dollars, deducting one hundred and seventy-three dollars and fifty cents on W's account, B's account being also deducted. This writing M. assigned to C., and ordered two hundred and fifty-seven dollars of the principal of the bond to be paid to C. It turned out that there was an error in the calculation, on which the writing given by B. to W. was founded, W. having paid to M., before the assignment to B., seventy dollars more than the writing stated. W. paid to C. the full sum of two hundred and fifty-seven dollars, (seventy dollars more than M. had a right to assign to him;) and, in an action on the bond, brought by M. for the use of B., it was *held* that W. was responsible to B. for this sum of seventy dollars paid to C.

ON a writ of error to the Court of Common Pleas of *Columbia* county, the record presented the following case:

An action of debt on a bond was brought by *Samuel M'Corkle*, for the use of *William Boyd*, against *Jacob Weaver*, the plaintiff

(Weaver v. M'Corkle, for the use of Boyd.)

in error. The bond was dated the 16th of *December*, 1822, conditioned for the payment of six hundred and six dollars and twenty-five cents, three days after date, to *Samuel M'Corkle*, who, on the 28th of *February*, 1823, transferred it to *William Boyd* in the words following: "Pay the within to *William Boyd*, or order." *Boyd* gave notice of this assignment to the defendant (the obligor) who acknowledged that it was a just bond, and promised to pay it, deducting certain credits to which he was entitled. It was agreed that these credits should be afterwards adjusted between *Boyd* and *Weaver*, and the defendant was warned to pay no more money to any person but *Boyd*, who held the bond. At the time of the assignment before mentioned, *Boyd* gave *M'Corkle* a writing, as follows: "I hold a bond, in favour of *Samuel M'Corkle*, on *Jacob Weaver*, and there appears to be due the said *M'Corkle*, on the said bond, two hundred and fifty-seven dollars, deducting one hundred and seventy-three dollars and fifty cents on *Weaver's* account, and *Boyd* and *Montgomery's* account deducted also." Signed, "*William Boyd*, February 28th, 1823." This writing was assigned by *M'Corkle* to *Peter Baldy*, in the following terms: "For value received, I hereby transfer to *Peter Baldy*, two hundred and fifty-seven dollars of the principal of the within mentioned bond, and order the same to be paid to him by *J. Weaver*, and by the person holding the bond, if money is or shall be paid to him." Dated, *February* 28th, 1823; and signed, *Samuel M'Corkle*. The fact was, that there was a mistake in the calculation, on which the writing given by *Boyd* to *M'Corkle* was founded. *Weaver's* payments to *M'Corkle* before the assignment to *Boyd*, were about seventy dollars more than one hundred and seventy-three dollars and fifty cents, the sum mentioned in *Boyd's* writing; so that *M'Corkle's* interest in the bond was seventy dollars less than two hundred and fifty-seven dollars, the sum which was supposed to be due in *M'Corkle's* assignment to *Baldy*. *Weaver* paid *Baldy* the sum of two hundred and fifty-seven dollars, (about seventy dollars more than *M'Corkle* had a right to assign to him,) and the question on the trial was, whether, for this sum of seventy dollars, *Weaver* should be responsible in this action to *Boyd*? The President of the court charged the jury in favour of *Boyd*, and the counsel for the defendant excepted to his opinion.

Grier and *Fricke*, for the plaintiff in error, cited *Clemson v. Davidson*, 5 Binn. 398.

Greenough and *Marr*, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. The argument in favour of *Weaver* is, that *Boyd* having acknowledged by his writing of the 28th of *February*, 1823, that the sum of two hundred and fifty-seven dollars was due to *M'Corkle*, and *Baldy* having paid value for an assignment of that sum, and *Weaver* having paid the same, on the faith

(Weaver v. M'Corkle, for the use of Boyd.)

of the writing, *Boyd* should not be permitted to gainsay it. But, in my opinion, this is giving to *Boyd's* writing more weight than it is entitled to. If it had been an indorsement of negotiable paper, the argument would have held good. But that is not the case. *Weaver* had received notice, that the whole bond was assigned to *Boyd*, and that he should pay to no other person. It was incumbent on him, therefore, before he paid *Baldy*, to inquire of *Boyd*, whether the sum of two hundred and fifty-seven dollars was really due to him. It is very material, that no communication passed between *Boyd* and *Baldy* or *Boyd* and *Weaver* on the subject. *Baldy*, therefore, took the assignment at his peril, and *Weaver* paid it at his peril. I do not see how *Baldy* could be in a better situation than *M'Corkle*, from whom he received this assignment. And I think there can be no doubt, that *Boyd* would have been permitted to correct any error in the settlement between him and *M'Corkle*, especially an error, that, in all probability, arose from the account which *M'Corkle* gave him of *Weaver's* payments. Those payments were known to *M'Corkle*, and could not have been known to *Boyd*. And it is a circumstance of some importance, that *Weaver*, if he examined, as he ought to have done, the writing signed by *Boyd*, must have known that there was a mistake in it,—he must have known that his own payments amounted to more than one hundred and seventy-three dollars and fifty cents. The assignee of a bond takes it subject to all objections which the obligor may legally make. Suppose, now, that a bond is given for the balance of an account settled between the obligor and obligee, and that this bond is assigned,—the obligor would be permitted to enter into the consideration of the bond, and show a plain error in the settled account. But if the assignee, previous to receiving the assignment, had applied to the obligor, and asked him if the whole money was due, and he had answered in the affirmative, he would have been estopped from denying it afterwards. In the present instance, *Weaver*, who knew that *M'Corkle* had assigned the whole bond to *Boyd*, and had been warned to pay to no one but *Boyd*, should have inquired of him before he paid to *Baldy*, whether all was right, and he should have informed *Boyd* that there appeared to be an error in the payments stated to have been made by him (*Weaver*) to *M'Corkle*. If he had done this, it would have led to an explanation. I cannot perceive how the case of *Baldy*, who accepted an assignment on the faith of *Boyd's* writing, can be stronger than that of the assignee of a bond, who pays his money on the faith of the bond. And the same observation may be applied to *Weaver*, who paid to the assignee of *M'Corkle*, on the faith of a writing given by *Boyd* to *M'Corkle*. Both *Baldy* and *Weaver* were deficient in making the proper inquiry. If either of them had applied to *Boyd*, they would have been safe; for *Boyd* must either have informed them of the error, or said that there was no error, which would have bound him to

(Weaver v. M'Corkle, for the use of Boyd.)

stand to the writing. On the evidence appearing on the record, I am of opinion, that the charge of the court in favour of the plaintiff was correct, and therefore the judgment should be affirmed.

Judgment affirmed.

[SUNBURY, JULY 5, 1826.]

HUSTON *against* MITCHELL.

IN ERROR.

An attorney at law, on record, is authorized to do those things only, which pertain to the conducting of the suit; and has no power to make a compromise by which land is to be taken instead of money.

The Court of Common Pleas has no right to set aside a judgment entered upon a verdict, without setting aside the verdict also.

Charles Huston, the plaintiff in error, brought this action on the case in the Court of Common Pleas of *Tioga* county, against *Richard Mitchell*, the defendant in error, to recover the purchase money of a tract of land, sold by the plaintiff to the defendant. At *September Term*, 1824, the plaintiff obtained a verdict for five hundred and ninety-two dollars, for which judgment was immediately entered. On the 17th of *February*, 1825, the defendant obtained a rule to show cause, by the first day of *May Term*, why the judgment should not be opened. On the 17th of *May*, 1825, on argument and affidavit filed, the court made an order *that the judgment should be opened*. The plaintiff sued out a writ of error on this judgment, returnable to *June Term*, 1825, when the following agreement was made and filed in this court: "On hearing of this case, the order of the court below of the 17th of *February*, 1825, and all subsequent orders, struck off, and the judgment to remain, as if no order had been made. But if the defendant transfer to the plaintiff the land purchased of him, clear of incumbrances done or suffered by the defendant, and which was the consideration of this suit, on or before the *Thursday* of the *September Tioga* court, then the plaintiff will enter satisfaction on this judgment." Signed, "*Thomas Burnside*, for *Charles Huston*. *H. Williston*, attorney for the defendant." As soon as the plaintiff was informed of this agreement, which was a few days after its date, he came to the court and moved that it might be vacated, at the same time making affidavit, that he had never authorized Mr. *Burnside* to enter into such a compromise. Mr. *Burnside* also declared in writing, that he was not employed by the plaintiff as his attorney, but made the agreement as his friend, supposing, from something which he had heard him say, that such a compromise would be agreeable to him. It appeared, that *Burnside* was not the plaintiff's attorney on record.

(Huston v. Mitchell.)

On a rule to show cause why the cause should not be reinstated, and the parties proceed to the argument, on the errors assigned,

Campbell and Greenough, for the plaintiff in error, stated the question to be, whether or not Mr. *Burnside*, who compromised the suit in the court below, had authority to make the compromise? The authority is positively negatived, not only by the plaintiff, but by Mr. *Burnside* himself. If he had been the attorney on record, his powers would not have embraced such an act. An attorney cannot even acknowledge satisfaction without receiving the money. 8 *Johns.* 367. But Mr. *Burnside* had not even the general authority of an attorney on the record, having made the compromise merely as a friend, under the impression that it would be satisfactory to the plaintiff.

Williston, for the defendant in error, contended that Mr. *Burnside* appeared as the attorney of the plaintiff, and his agreement of compromise was binding on his client. When an attorney appears, the court looks no further, but leaves the party to his action, if the attorney had no power. *Jackson v. Stewart*, 6 *Johns.* 34. If an attorney appears and confesses judgment, it is good although he has no power, and the party injured is left to his action against the attorney; but the court will inquire into the matter and do justice, if the attorney be insolvent. This is the law of *England*. In *New York*, if the attorney has no power, the court will let the defendant into a defence on the merits, preserving the lien of the judgment. 6 *Johns.* 296.

THE COURT declared they had no doubt that the cause should be reinstated, and the argument proceeded in, and said that an opinion in writing should be delivered.

Williston, on behalf of the defendant in error, then moved to quash the writ of error, on the ground that the action was still pending below. It now stands, he said, upon the verdict, and the plaintiff, instead of issuing a writ of error, which does not lie in such a case, ought to have applied for a *mandamus*, directing the court below to enter judgment.

The counsel for the plaintiff in error answered, that the court below had made a final order, depriving the plaintiff of the benefit of his verdict, without ordering a new trial. There was no redress except by writ of error. Whenever the cause is brought to an end, a writ of error lies. An order dismissing an appeal, is in the nature of a judgment, and is the subject of a writ of error. 3 *Binn.* 273. The order of the court, in the present case, amounts to an arrest of judgment.

THE COURT told the counsel to proceed in the argument of the errors assigned, after hearing which, they would give their opinion, both on the motion to quash, and on the errors assigned, if it should be necessary.

Campbell and Greenough, for the plaintiff in error, contended, 1. That there was error in opening the judgment on a verdict

(Huston v. Mitchell.)

at the third term, on a motion made at the second term. In ordinary cases, the court cannot set aside a verdict if a term has intervened between the verdict and the motion to set it aside. Nothing but fraud would authorize such an order. *Ewing v. Tees*, 1 Binn. 455.

2. Supposing the court to have possessed the right to open the judgment at their discretion, it must be shown that there was good ground for the exercise of that discretion; and this must appear on the record. The order of the court appearing on the record, went no further than to open the judgment, which deprived the plaintiff of the benefit of a verdict, and amounted to a perpetual injunction; and for this no reason is assigned.

Williston, contra. There can be no doubt of the right of the court to set aside, both a verdict and a judgment. *Reigal v. Woods*, 1 Johns. Ch. R. 402. Cases may easily be supposed, in which the court may inquire into the manner in which a judgment has been obtained. A verdict may have been procured by fraud, and if the court do not possess the power to open the judgment, the grossest injustice may go unpunished. The reasons which induce the court to exercise this discretionary power, may be of the most powerful kind; but as it is not usual to put reasons on the record, in such cases, they must be unknown to this court. The order, in this case, did not amount to a perpetual injunction. The intent was, that there should be a new trial, and the judgment was opened with that view. A mere clerical omission, has prevented this intent from appearing on the record.

The opinion of the court was delivered by

TILGHMAN, C. J. Supposing Mr. *Burnside* to have been the plaintiff's attorney on record, he would only have been authorized to do such things as pertained to the conducting of the suit. It is said, by Chief Justice MARSHALL, who delivered the opinion of the court in *Holker v. Parker*, (7 Cranch, 452,) "that an attorney at law, merely as such, has, strictly speaking, no right to make a compromise," but that he has a right to enter into a reference. The compromise, in that case, was, by the attorneys on both sides, consenting that the referees should make an award for the plaintiff for a certain sum, without any examination of the evidence, or accounts of the parties. That compromise fell much more within the general power to conduct the suit, than the one now under consideration. There, the suit was for money, and the attorney agreed to take an award for money. But here, the object of the plaintiff's suit, which was for the recovery of money, was entirely defeated by an agreement to take land instead of money. I cannot conceive how the authority to make such a compromise, can be deduced from the general power of an attorney at law. If the plaintiff, on being informed of the agreement, had not immediately disavowed it, I should have thought, that his silence would have

(Huston v. Mitchell.)

afforded ground for presumption, that he had given power to make it, or was willing to ratify it. But his prompt disavowal leaves no room for such a presumption. If the agreement is set aside, the defendant is in no way injured. He is placed exactly in the situation, in which he stood before it was made. I am of opinion, therefore, that the agreement should be vacated.

This preliminary point being settled, I will consider the errors which have been assigned on this record. There is but one of any weight, viz. "that the award, or judgment, of the court below, reverses a regular judgment, and makes an end of the plaintiff's claim, and amounts to a perpetual injunction, as the verdict is not set aside or affected." It was said by the counsel for the defendant, that the intent of the court was to order a new trial, but the prothonotary made a mistake in entering the order. This is very possible, but we must take the record as we find it. As it stands, it is a simple order, *that the judgment be opened*. I shall give no opinion on the power of the Court of Common Pleas to set aside a verdict and judgment, and order a new trial, on a motion not made until the second term after the entry of the judgment. But granting, for the sake of the argument, that they have the power, is the order made in this case legal? I do not think it is, because it does not amount to a judgment in favour of the defendant, and yet leaves the plaintiff without the means of proceeding in his suit. The verdict is not set aside, though the judgment entered on it is rendered ineffectual. The plaintiff can neither enter judgment on the verdict, nor take out a *venire facias de novo*. This is a situation in which the court had no right to place him. They have made an end of the suit, without showing any ground for so doing. Indeed one cannot help seeing, that it could not have been their intent to make an end of it, although by the record, from which we cannot depart, it appears that in effect they have done it. I am of opinion that in this there was error, and therefore the order to open the judgment should be reversed, and the record remitted, to be further proceeded in according to law.

Order reversed, and record remitted, &c.

[SUNBURY, JULY 5, 1826.]

OVERTON *against* TRACEY.

IN ERROR.

A party who joins in a commission and examines witnesses upon cross-interrogatories, cannot, upon the trial of the cause, object that the interrogatories of the other party are leading in their character.

If, upon the execution of an assignment of a bond and mortgage under seal, and in the presence of two witnesses, which neither contains a guarantee of the sufficiency of the mortgaged premises and the solvency of the mortgagor, nor states that it is without recourse to the assignor, the assignor declare, that the mortgaged premises are worth double the sum for which they are mortgaged, that the mortgagor is solvent and able to pay the debt, and that if he should fail to do so, he, the assignor will be accountable for it, and, upon being requested by the assignee to have the guarantee reduced to writing, he reply, that it is unnecessary, that there are witnesses present who can establish the fact, an action of *assumpsit* may be maintained by the assignee against the assignor, upon this parol guarantee.

It is no objection to such an action, that no notice was given to the assignor of the failure of the mortgagor to pay the debt, or of the sale under the mortgage; unless it appear that the assignor was prejudiced by want of notice, or could have received any benefit from notice.

The act of limitations does not begin to run against a parol guarantee of the sufficiency of a mortgage, given to secure a bond payable by instalments, and of the solvency of the mortgagor, until six years after the last instalment has become due.

It is no infraction of the law, for a person holding the *Pennsylvania* title, to agree with a settler under a *Connecticut* title, for the surrender of his possession, on paying to him a compensation for his improvements, buildings, and crop in the ground; and where the fact, whether the contract was for the purchase of the possession and improvements, or of the title to the land, depends, as well upon other evidence, as upon writings, it is proper to submit the question to the decision of the jury.

WRIT of error to the Court of Common Pleas of *Bradford* county.

Solomon Tracey, the defendant in error and plaintiff below, brought this action of *assumpsit* to *September* Term, 1820, against *Thomas Overton*, the plaintiff in error, upon a parol guarantee of the solvency of one *Robert Drew*, and of the sufficiency of certain real estate to pay a debt for which it had been mortgaged by the said *Robert Drew* to the plaintiff in error, who had assigned the mortgage, together with the bond to secure which it was given, to the said *Tracey*.

The declaration contained three counts.

The first count set forth, that in consideration that the said *Tracey* would release and convey to the said *Overton* all his right, title, and possession to a farm in the township of *Ulster*, in the county of *Bradford*, and would receive in part payment therefor, a bond against the said *Drew* for fifteen hundred and ninety dollars, payable in seven annual instalments, commencing the 1st of *November*, 1810, accompanied by a mortgage executed by the said *Drew* to the said *Overton*, on certain lands in the township of

(Overton v. Tracey.)

Tunkhannock, county of *Luzerne*, he, the said *Overton*, on the 28th of *December*, 1808, undertook that the said bond and mortgage were good and collectable, and that the said *Drew* was then solvent and in good circumstances, and was fully able to pay the amount, when due: That the said *Tracey*, confiding in the said promises, did sell and convey all his right, title, interest, and possession to the said *Overton*, and received therefor, to wit, for the sum of fifteen hundred and ninety dollars, the aforesaid bond and mortgage. Nevertheless, &c. the said bond and mortgage were not good and collectable, and the said *Drew* was not solvent and in good circumstances, and able to make payment of the said bond as it became due, &c.

The second count stated, that in consideration that the said *Overton* was indebted to the said *Tracey* in the sum of fifteen hundred and ninety dollars for a certain other farm, &c., before that time sold and conveyed by the said *Tracey* to the said *Overton*, and that the said *Tracey* received in full payment from the said *Overton*, for the said sum of money, a certain other bond against *Drew* for fifteen hundred and ninety dollars, payable, &c., and a mortgage executed by the said *Drew* on certain lands, described as, &c., containing three hundred and ninety-seven and a half acres, the said *Overton* undertook that the said bond and mortgage were good and collectable as the same should become due, and that the said *Drew* was solvent and possessed of a large property, and fully able to pay the amount of the said bond, and would pay the same as it should become due: That the said *Tracey* did accept the said bond and mortgage, in full satisfaction of the said sum due as aforesaid to him. Nevertheless, &c.

The third count stated, that the said *Tracey* was possessed of a certain other farm, of the value of eight thousand dollars, situate, &c., and agreed to sell to the said *Overton* all his right, title, and interest in the same, and to deliver possession thereof to the said *Overton*, for a certain sum agreed upon between them, and in consideration that the said *Tracey* would accept in part payment thereof a certain bond of one *Drew*, dated, &c., for the payment of fifteen hundred and ninety dollars, payable, &c., and a mortgage on certain property described, &c., executed by the said *Drew*, the said *Overton*, undertook that the said *Drew* should pay the amount of the said bond as the same should become due, and if *Drew* should make default, the said *Overton* would pay the same: That the said *Tracey*, confiding, &c., did sell and convey all his right, title, interest, &c., in the said farm, and delivered possession thereof to the said *Overton*, and did accept in part payment of the sum agreed upon, the said bond and mortgage, at the full amount thereof. Nevertheless, &c.

The defendant pleaded, *non assumpsit* and *non assumpsit infra sex annos*.

In support of his case, the plaintiff offered in evidence the depo-

(Overton v. Tracey.)

sition of *Constant Williams*, taken under a commission to the state of *Indiana*.

The counsel of the defendant objected to the reading of the answers to the second, third, fifth, sixth, and seventh interrogatories, on the ground that the questions put to the witness were leading questions. The court overruled the objection, and allowed the deposition to be given in evidence to the jury, upon which an exception was taken to their opinion.

The interrogatories exhibited to the witness, and his answers to them, were as follows:

1st *Interrog.* "Do you know the parties in this suit, or either of them, and which of them, and how long have you known them?"

2d "Have you any knowledge of a bond and mortgage given by *Robert Drew* to *Thomas Overton*, the defendant in the above cause, and assigned by the said *Thomas Overton* to *Solomon Tracey*, the above named plaintiff? Look at the mortgage now shown to you, and the assignment made thereon;—Is the name *Constant Williams*, subscribed under the assignment appearing on the said mortgage, as a witness,—your signature? Did you see the said *Thomas Overton* execute the said assignment? Did you see the other person, whose name appears as a witness to the said assignment, subscribe his name thereto as a witness?"

3d. "Did you see a bond, purporting to be executed by *Robert Drew* to the said *Thomas Overton*, assigned by the said *Thomas Overton* to the said *Solomon Tracey*? If yea,—were you a subscribing witness to such assignment, and was there any other subscribing witness to such assignment? If yea,—who was such subscribing witness, and when and where was such assignment executed?"

4th. "Do you know whether any, and what consideration was given by the said *Solomon Tracey* to the said *Thomas Overton*, for the assignment of the said bond and mortgage? State freely your knowledge herein.

5th. "Did the said *Solomon Tracey*, at the time of the assignment and delivery of the said bond and mortgage, by the said *Thomas Overton*, or at any other and what time, require from the said *Thomas* any guarantee, assurance, or promise, that the conditions and payments in the said bond and mortgage expressed, and specified to be performed, made, or done by the said *Robert Drew*, should be faithfully and punctually performed, made, and done by the said *Robert Drew*? Did the said *Solomon Tracey* refuse to accept from the said *Thomas Overton* the assignment of the said bond and mortgage, unless the said *Thomas* should make some guarantee, assurance, or promise to the said *Solomon* that the said bond and mortgage should be punctually paid by the said *Robert Drew*? If yea,—what was the guarantee, assurance, or promise so required?"

6th. "Did the said *Thomas Overton*, at the time of the as-

(Overton v. Tracey.)

signment of the said bond and mortgage to the said *Solomon Tracey*, or at any other and what time, make any promise, declaration, or guarantee to the said *Solomon Tracey*, that the amount of the said bond and mortgage of the said *Robert Drew* should be punctually paid? Did the said *Thomas Overton* make any promise to the said *Solomon Tracey*, that in case the said *Robert Drew* should make default in payment of the said bond and mortgage, that he, the said *Thomas*, would pay any thing to the said *Solomon*, or do or perform any thing for the benefit of the said *Solomon*? If yea,—state what was such promise, when made and where, and the circumstances fully.

7. “Did the said *Thomas*, at the time of the assignment of the said bond and mortgage against *Robert Drew*, to the said *Solomon*, or at any other and what time, make any affirmation, declaration, or promise to the said *Solomon*, relative to the value of the land contained in the said mortgage, or relative to the solvency and ability of the said *Robert Drew* to pay the said bond and mortgage? If yea,—state fully what was such affirmation, declaration, or promise, when and where made, and the circumstances relating thereto.

“Lastly, Do you know any other matter?”

Cross-interrogatories, on the part of the defendant.

1st. “Do you know whether the mortgage now exhibited to you by the plaintiff, was the only mortgage assigned at that time by the defendant to the plaintiff? If not,—state what others, and to what amount.

2d. “What amount of money was paid by the defendant to the plaintiff, and for what was it paid?

3d. “What was the whole amount which the defendant was to pay to the plaintiff, for the release to him of the farm referred to by you, and how, in what manner, and at what time was it paid?

4th. “Repeat the exact words made use of by the defendant to the plaintiff, and how and in what manner they were used, and whether they were used at the time of executing the assignment or before. If before,—how long before? And whether such words were applied to the bond and mortgage shown to you, and to no others? If to any others,—to how many others? If only to the one now shown, how do you recollect this bond and mortgage, and could you have named it, if it had not been exhibited?”

Answers to the interrogatories taken the 10th of July, 1823.

“*Constant Williams*, aged fifty-eight years, being first duly sworn, to the first interrogatory on the part of the plaintiff, answers that he knew the parties in this suit, and has known them ever since the year 1807, or upwards of sixteen years.

“To the second interrogatory, that he has a knowledge of a bond and mortgage given by *Robert Drew* to *Thomas Overton*, the defendant in the above cause, and assigned by the said *Thomas*

(Overton v. Tracey.)

Overton to Solomon Tracey, the above named plaintiff. The witness further answers, after looking at the mortgage and the assignment made thereon, and the name, that *Constant Williams*, subscribed under the assignment as a witness, is the signature of this deponent. The witness also states, that he did see the said *Thomas Overton* execute the said assignment. He also states that he saw *Wanton Rice*, whose name appears as a witness to the said assignment, subscribe his name thereto as a witness.

“To the third interrogatory, that he saw a bond, purporting to be executed by the said *Robert Drew* to the said *Thomas Overton*, assigned by the said *Thomas* to the said *Solomon*, and that he was a subscribing witness to the said assignment,—also *Wanton Rice*,—and that the said assignment was executed at the house of *Solomon Tracey*, in *Old Sheshequin*, *Lycoming* county, now *Bradford* county, state of *Pennsylvania*.

“To the fourth interrogatory, that the consideration given by the said *Solomon Tracey* to the said *Thomas Overton*, for the assignment of the said bond and mortgage, was fifteen hundred and ninety dollars.

“To the fifth interrogatory, that the said *Solomon Tracey* did, at the time of the assignment and delivery of the said bond and mortgage by the said *Thomas Overton*, require from the said *Thomas* a guarantee and assurance, that the condition and payments in the said bond and mortgage expressed, and specified to be performed, made, or done by the said *Robert Drew*, should be faithfully and punctually performed, made, and done by the said *Robert Drew*. The guarantee and assurance of *Thomas Overton* to *Solomon Tracey* was, that in the event of *Robert Drew* failing to comply with the guarantee and assurance so as aforesaid named, that he, the said *Thomas Overton*, would be responsible for the performance of the same to the said *Solomon Tracey*.

“To the sixth interrogatory, that he knows nothing further than he has already repeated in answer to the fourth and fifth interrogatories.

“To the seventh interrogatory, that the said *Thomas Overton* did, at the time of the said assignment of the said bond and mortgage against *Robert Drew* to the said *Solomon Tracey* state, that the value of the land contained in the said mortgage was worth double the amount for which the same was mortgaged. *Thomas Overton* at the same time represented to *Solomon Tracey*, that the said *Robert Drew* was in solvent circumstances, and able to pay the amount of the mortgage money, and, in the event of failure on the part of the said *Robert Drew*, that he, the said *Thomas Overton*, would be accountable to the said *Solomon Tracey* for the value contained in the said mortgage bond, amounting to the sum of fifteen hundred and ninety dollars; *Tracey* observed to *Overton* that the guarantee alluded to should be reduced to writing. *Overton's* reply was, that it was unnecessary, as several witnesses were present, who could establish the fact.

(Overton v. Tracey.)

“To the first cross-interrogatory of the defendant, the witness answers:—The mortgage now exhibited to me by the plaintiff, was the only mortgage assigned at that time by the defendant to the plaintiff.

“To the second cross-interrogatory, that the amount of money paid by the defendant to the plaintiff, he thinks did not exceed twenty dollars, and that the said money was paid to bind the bargain of the farm alluded to.

“To the third cross-interrogatory, that the whole amount which the defendant was to pay the plaintiff for the release to him of the farm referred to, was between twenty-four and twenty-six hundred dollars. I know of no payment being made, except the bond and mortgage, and not exceeding twenty dollars besides, at the time of the assignment and delivery of the bond to *Solomon Tracey*.

“To the fourth cross-interrogatory, that he is unable to repeat the exact words made use of by the defendant to the plaintiff, and that the conversation between the plaintiff and defendant, before and after the assignment, had an allusion to the mortgage and bond exhibited to the witness, by the plaintiff at this time. I well recollect the bond and mortgage, and could have named them, if they had not been exhibited on this day to me; and further the witness cannot answer.”

Ira Tracey, another witness on the part of the plaintiff, whose deposition was read in evidence, stated, that on or about the 28th of December, *Solomon Tracey*, the deponent's father, and *Thomas Overton*, were about making a bargain, by which the said *Tracey* was to sell and convey to the said *Overton*, his farm in *Ulster*, on which the said *Overton* then resided, who agreed, as part payment of the purchase money, to assign to the said *Tracey* a bond and mortgage, given by *Robert Drew* to *Overton*, upon a tract of land in *Tunkhannock* township, *Luzerne* county: That, at the same time, *Overton* told *Tracey*, who had not seen the mortgaged land, that it was a valuable tract, and worth the money for which it was mortgaged: That, at any rate, *Drew* was able to pay the amount of the mortgage, and that he, *Overton*, would guaranty the amount of it, and see that it was regularly paid, agreeably to the stipulations contained in the bond. This conversation took place, as the deponent thought, on the day on which the said bond and mortgage were assigned by *Overton* to *Tracey*, and before or at the time of the assignment. The deponent further stated, that one or two days after the above-mentioned transaction, he was present at a conversation between the said *Solomon Tracey*, his mother, *Mehitable Tracey*, and the said *Thomas Overton*, when the said *Mehitable* said to *Overton*, “I am afraid you have cheated my son, as you are a lawyer, and he is unacquainted with the law, and that you have taken some advantage of him.” Upon which *Overton* replied, that he had not, and would not, because he had made himself accountable for the debt, if *Drew* did not pay it.

(Overton v. Tracey.)

The mortgage assigned by *Overton* to *Tracey*, was dated *November* 1st, 1808, and recited a bond conditioned for the payment of fifteen hundred and ninety dollars, in equal annual instalments, the first of which became due on the 1st of *November*, 1810, and the last on the 1st of *November*, 1816.

The assignment which was endorsed upon the bond and mortgage, was in these words, viz:—

“Know all men by these presents, that I, *Thomas Overton*, the within named mortgagee, for and in consideration of the sum of fifteen hundred and ninety dollars, paid to my satisfaction, have granted, bargained, and sold, assigned, and set over all my right, title, interest, claim, and demand, of, in, and to the said within indenture of mortgage, together with all the privileges therein contained, unto *Solomon Tracey*, of the same place, yeoman. Witness my hand and seal, *December* 28th, 1808.

Witness,

Thomas Overton. (Seal.)

Wanton Rice, }
Constant Williams.” }

The mortgaged premises were sold on the 7th of *August*, 1819, under a *levari facias*, issued by *Solomon Tracey*, and purchased for fifty dollars by *Tracey*’s attorney.

It appeared, from the testimony of *William Keeler*, that *Robert Drew* was a foreigner, in poor circumstances, who did not appear to possess any other property than a yoke of oxen and a cart: That the mortgaged premises were hill land, of which twenty or twenty-five acres were improved, and upon which a log house and a good barn were erected.

The defendant then gave in evidence a receipt signed by *Solomon Tracey*, dated *December* 28th, 1808, by which he acknowledged to have received, in part payment of his farm, the said bond and mortgage from *Robert Drew* to *Thomas Overton*. He also gave in evidence a deed for part of the said farm, dated *December* 5th, 1787, from *Jeremiah Shaw* to *Solomon Tracey*, containing a covenant against the grantor himself, or any person claiming under *Connecticut* claimants. A deed for another part of the said farm, dated the 10th of *May*, 1792, from *C. Bingham* to *Solomon Tracey*, covenanting that the grantor was the true and lawful owner under the *Susquehanna* company. A deed for another part of the said farm, dated the 16th of *October*, 1796, from *A. Brockace* and *J. Gore* to *Solomon Tracey*, covenanting that they had a legal title under *Connecticut*, and a deed for another part of the said farm, dated the 29th of *October*, 1789, from *Jedidiah Shaw* to *Solomon Tracey*, containing a warranty against persons claiming under *Connecticut*. On each of these deeds was endorsed a deed poll, bearing date the 28th of *December*, 1808, conveying all the right title, interest, claim, and demand of the said *Solomon Tracey* in the premises to the said *Thomas Overton* in fee. The

(Overton v. Tracey.)

aggregate amount of the consideration of the several conveyances, from *Tracey* to *Overton*, was two thousand eight hundred and eighty-five dollars.

It was stated by a witness, that he had frequently heard *Overton* say, that he was the agent of *S. M. Fox*, at the time he purchased of *Tracey*: That *Tracey* would not purchase the *Pennsylvania* title, and therefore he purchased it, and then bought *Tracey* out; and a deed, dated the 1st of *October*, 1809, from *S. M. Fox* to *Thomas Overton*, was given in evidence.

When the evidence was closed, the defendant's counsel requested the court to charge the jury,—

1. "That the receipt dated the 28th of *December*, 1808, and witnessed by *Williams* and *Rice*, is to be regarded as the written contract of the parties; that if the jury believe this paper was executed subsequently to the conversation alluded to by *Williams* in his deposition, in such case the written contract would be the contract between the parties, and the jury should not suffer the parol evidence to vary it.

2d. "That if any guarantee was made, the plaintiff must show such a contract as is laid in the declaration; and that, to recover under such a contract, he must prove that he has proceeded upon the bond; and that he could recover nothing at the time the instalments became due, or at any rate previous to bringing this suit; that the sale upon the mortgage could not affect the rights of the defendant, without notice of the suit and sale, which is not proved; which sale, without such notice, is evidence of fraud upon the part of the plaintiff, inasmuch as he might and did, by means of his attorney, purchase the same at a low price; that notice should have been given to the defendant of the failure of *Drew* to pay each instalment.

3d. "That under the contract, as laid in the declaration, the statute of limitations would commence at the time of the assumption; and, if not then, it would operate, as to each instalment, from the time each became due.

4th. "That this is an action of *assumpsit*, and the plaintiff can only recover under the guarantee; and that the allegations of the defendant having declared that *Drew* was solvent and in good circumstances, would be the foundation of an action of deceit, if he were not solvent, &c.; but that, under such allegations, even if proved, he could not recover in the present action.

5th. "That there is no evidence before the jury, to show that *Drew* is not at this time in good circumstances, and able to pay the bond.

6th. "That if the jury believe, that the contract between *Tracey* and *Overton* was for the sale and purchase of a title and possession under the state of *Connecticut*, the land not lying within either of the old seventeen townships of *Luzerne*, such contract, at common law, and under the laws of *Pennsylvania*, exist-

(Overton v. Tracey.)

ing at the time of such contract made, would be absolutely void; and that the plaintiff cannot recover. That even if the defendant, at such time, was acting in the capacity of agent of Mr. *Fox*, the *Pennsylvania* owner, it would not alter the nature of the contract; particularly if Mr. *Overton* purchased the property for himself.

7th. That the title of *Tracey* having failed to this property, *Samuel Fox* having been the real owner under the state of *Pennsylvania*, which last title the defendant afterwards purchased, such failure would be a good defence to the present action.

“That the assignments on the back of *Tracey*’s deeds would refer to the title mentioned in them, and that it is the province of the court to construe such assignments, and the title under them.”

The charge of the court was as follows:—

“This is an action, brought by the plaintiff against the defendant, to recover the amount of the *Drew* mortgage, with interest, which was assigned by *Overton* to *Tracey*, in part payment of the farm sold by the latter to the former, lying in *Old Sheshequin*.

“It is alleged by the plaintiff, that, at the time of the bargain and assignment of the mortgage, the plaintiff was ignorant of the land, or its value contained in the mortgage, and also with *Drew*, and his circumstances; and that at that time *Overton* stated to him, that the land was worth double the amount of the money received, that *Drew* was able to pay that sum, and that he would guaranty the payment.

“1st. It is a general rule of law, that all conversations, agreements, and negotiations between parties are done away by their written agreements, and that the writings are not to be varied by parol, unless the parol declarations were made at the time of executing the writings, or by agreements made subsequent thereto. It seems that the receipt, the assignment of the mortgage, and the deed from *Tracey*, are dated the 28th of *December*, 1808; and it is fair to presume they were made at the same time.

“2d. If the jury believe, from the depositions of *Williams* and *Tracey*, that the defendant made the statements and guarantee mentioned by them, at the time of executing the writings, and that the money could not be made out of the mortgaged premises or of *Drew*, the plaintiff might recover in this suit without having proceeded on the bond. And if, in endeavouring to collect the money by proceedings on the mortgage, his conduct was fair and *bona fide*, he was not bound to give notice to the defendant of such proceedings, and might cause the premises to be sold and purchase them in himself; and, particularly, as the plaintiff has offered here in court, to make the same title to *Overton* for two hundred and fifty dollars, or consent that the jury may deduct that sum from the amount, if they find for him.

“3d. The plaintiff was not bound by the statute of limitations,

(Overton v. Tracey.)

until six years after the whole amount of the mortgage money became due.

"4th. If the money could not be made from the mortgage, and if the defendant made the guarantee alleged, with the evidence of *William Keeler*, that about the time of the assignment he was acquainted with *Drew*, and that he had no other property than a yoke of oxen and a cart, as he knew of,—the plaintiff may recover without having taken any legal steps against *Drew*, and without showing any thing further about him.

"5th. *William Keeler's* testimony is all the evidence upon this point.

"6th. If the jury believe, that the contract between *Tracey* and *Overton* was for the sale and purchase of the *Connecticut* title to the *Sheshequin* farm, then the contract would be void, and the plaintiff could not recover; but if the jury believe that the contract and sale of the farm were for the possession and valuable improvements of *Tracey* only, then the plaintiff is entitled to recover.

"7th. If *Tracey* sold to *Overton* what they considered the title to the land, when the real title was in *Fox*, which the defendant had subsequently to purchase, it is a good defence to this action; but if *Overton* was the agent of *Fox*, acquainted with *Fox's Pennsylvania* title to this farm, and contracted with *Tracey* for his improvements only, the assignment by *Tracey* of his right on the back of the *Connecticut* deeds ought not to prevent a recovery, and it would be against justice and a good conscience for the defendant to obtain possession of *Tracey's* valuable improvements, and then protect himself behind the *Connecticut* title, when neither party considered that title in their contract."

To this opinion the counsel for the defendant tendered a bill of exceptions, which was sealed by the court.

Conyngnam and *Dennison*, for the plaintiff in error.

1. In suffering to be read in evidence the answers of *Constant Williams* to the second, third, fifth, sixth, and seventh interrogatories, the court below was wrong. They were leading questions, which directed the witness to the answers he was to give, and, in fact, he did answer in the words of the interrogatories. In equity, where interrogatories are of a leading nature, the answers to them are suppressed upon application to the Master. 2 *Madd. Ch.* 412. The party injured must have some opportunity of redress against leading interrogatories, and with us no other opportunity presents itself than at the trial. The practice has been to make the objection at the trial, and this practice is supported by authority. 3 *Am. Dig.* 227. 3 *Little's Rep.* 77. 1 *Yeates*, 404. 6 *Binn.* 489, 490. In *Shuler v. Spear*, 3 *Binn.* 133, it was held, that a party who is present, and cross-examines, cannot object to leading questions on the trial; but there is an obvious distinction between answers to

(Overton v. Tracey.)

interrogatories on a commission, and those which are given on the taking of a deposition, where the parties are present and put their questions in person. If the objection cannot be made at the trial, the evil is without remedy.

2. The court erred in charging the jury, under the first point, that the writings were not to be varied by parol, unless the parol declarations were made at the time of executing the writings; and, under the second point, that if the jury believed, from the depositions of *Williams* and *Tracey*, that the defendant made the statements, and gave the guarantee mentioned by them, at the time of executing, &c., the plaintiff might recover. This was laying down the law too broadly. If the case had been submitted to the jury on a question of fraud, there would have been no cause of complaint. But no fraud was alleged in the execution of these writings; and the court submitted the case to the jury upon the broad ground, that any parol declarations made at the time of their execution, would control the writings. The admission of parol evidence is confined to cases of fraud, mistake, or the omission of the scrivener to insert what the parties intended should be introduced into the writing. *Christ v. Diffenbach*, 1 *Serg. & Rawle*, 464. *Heagy v. Umberger*, 10 *Serg. & Rawle*, 339. The case of *Mumford v. M'Pherson*, 1 *Johns*. 415, is in point. A ship was sold by bill of sale in writing; and the court refused to admit evidence to prove a parol guarantee, at the time of executing the bill of sale. The circumstance of no exception having been taken to the evidence before it was given, is no reason why it should not afterwards be taken. We had our choice, either to except to it or let it go to the jury, and pray the court's opinion on its effect.

3. There was error in the charge, under the second point, that it was not necessary for the plaintiff below to give notice to the defendant, of the failure of *Drew* to pay the instalments as they became due upon the bond *Gibbs v. Cannon*, 9 *Serg. & Rawle*, 200. If the defendant had received notice of the nonpayment of the different instalments, he might perhaps have saved himself.

4. It was an erroneous opinion, that if *Drew* was insolvent at the time of the assignment, and the money could not be recovered on the mortgage, the plaintiff might recover, without having brought an action against *Drew*.

5. The court below erred in instructing the jury, under the third point, that the plaintiff was not bound by the act of limitations until six years after the whole amount of the mortgage money became due. The guarantee laid in the declaration, was not of the mortgage, but of the bond; that the several instalments should be paid as they fell due. The act of limitations began to run from these periods respectively, if not from the time of the assumption.

6. The court left the construction of written instruments to the jury. The only evidence of *Overton's* purchase from *Tracey*, was contained in these writings, which showed that the subject

(Overton v. Tracey.)

of the conveyance was a *Connecticut* title, the purchase and sale of which are expressly forbidden by act of assembly. The act of the 11th of *April*, 1795, (3 *Sm. L.* 209, *sect.* 1,) severely punishes all intrusions, under any pretended title not derived from *Pennsylvania*; and the territorial act of the 16th of *April*, 1802, (3 *Sm. L.* 525, *sect.* 4,) renders utterly void all contracts in relation to *Connecticut* titles. One who enters under *Connecticut*, acquires no title either in law or equity. No action, therefore, is maintainable upon a bond given for the purchase money, on the sale of a *Connecticut* title. *Mitchell v. Smith*, 1 *Binn.* 110. The object of the act of the 6th of *April*, 1802, was to cut up these pretended titles by the roots. *Irish v. Scovil*, 6 *Binn.* 55. It did not appear that *Overton* held the *Pennsylvania* title. The only evidence on the subject, was his own declaration; and, at one time, he stated that he had purchased the land from *Fox*, and, at another, that he was the agent of *Fox* when he purchased from *Tracey*. But if he had the *Pennsylvania* title, it is against the policy of the law that a *Pennsylvanian* should purchase a *Connecticut* title. Upon the same principle, one who settles under a *Connecticut* title, is estopped from saying that he claims under *Pennsylvania*. *Dailey v. Avery*, 4 *Serg. & Rawle*, 281. The possession of the good title does not purge the illegality of the purchase of that which is prohibited. There being no other evidence of this transaction than that which the writings contained, the court should have instructed the jury positively on the subject, and not have left it for them to decide whether the contract was for the sale of the land, or of the improvements only.

Kenny and *Williston*, for the defendant in error.

1. The interrogatories objected to as leading, are not of that character. To the sixth, which has the greatest appearance of being so, the witness answered nothing. But, if they were so, the objection comes too late. Leading questions should be objected to at the time of taking the deposition of a witness. *Strickler v. Todd*, 10 *Serg. & Rawle*, 73. This commission was executed at a great distance, and at great expense, and if there was any objection to the interrogatories, it ought to have been made before filing the cross-interrogatories, or at the next court. To wait until the trial is unreasonable.

2. Parol declarations, made at the time of executing a writing, have uniformly been admitted, in cases of fraud and where equity required that they should be received. This is precisely such a case. *Tracey* was tricked into the execution of his deed by the assurances of *Overton*, that *Drew* was a man of property, and the mortgage good security, and that he would guaranty it. There was nothing in the evidence inconsistent with the deed, and the propriety of admitting it is fully supported by authority. *Field v. Biddle*, 2 *Dall.* 171. *Christ v. Diffenbach*, 1 *Serg. & Rawle*, 464, 465. 1 *Phil. Ev.* 483. *Lessee of Dinkle v. Marshall*, 3 *Binn.*

(Overton v. Tracey.)

587. *Drum v. Simpson*, 6 Binn. 478. Besides, no objection was made to the evidence, and it is not error to admit that to which no exception has been taken. *M'Cullough v. Elder's Executors*, 8 Serg. & Rawle, 181.

3. Notice of the nonpayment of the instalments as they become due upon the bond was not necessary. It was not negotiable paper, in relation to which notice is required by the custom of merchants. *Overton* guarantied the bond, and it was his business to see that it was paid. It was proved, that *Drew* was insolvent at the time the assignment was made of his bond and mortgage. As to the notice of the sale under the mortgage, we offered, and now offer again, to convey to *Overton* the land purchased at sheriff's sale, for two hundred and fifty dollars, which is no more than what it cost, including the expense of the suit against *Drew*, and in fact the jury did deduct that sum from our demand.

4. The act of limitations could not begin to run until one year after the last instalment became due, because until that time no proceedings could be had on the mortgage; and until the land was sold under the mortgage, it could not be ascertained whether or not the security was sufficient. [The COURT told the counsel, that it was unnecessary to speak further to this point.]

5. When *Tracey* purchased the *Connecticut* title in 1789, there was no act of assembly prohibiting such purchases. His entry was lawful, and he made valuable improvements on the land. Whether he sold these improvements or the land itself, was a fact which depended, not upon papers alone, but upon other evidence also. This evidence did not contradict the writing, and the whole was properly submitted to the decision of the jury, whose verdict negatives the sale of the *Connecticut* title. There was nothing in this transaction prohibited by law. The design of the territorial act of the 6th of April, 1802, was to extinguish all titles under *Connecticut*, by prohibiting and rendering void all contracts in relation to them. But it was never intended to prevent a *Pennsylvania* claimant from making a compensation to the *Connecticut* settler for his time, labour, and money expended in making improvements. In the present transaction, there was no sale of the title. It was no more than a surrender of the possession to a *Pennsylvanian*, whose title was good, on receiving a reasonable allowance for improvements. In this respect, this case differs from that of *Smith v. Mitchell*, 1 Binn. 110.

The opinion of the court was delivered by

DUNCAN, J. The several questions raised on this record are important, and have received all the consideration their importance demands. It was an action of *assumpsit*, on a parol guarantee of the solvency of the debtor, and the adequacy of the lands mortgaged to pay the mortgage money. The assignments of the bond and mortgage were made under seal, and in the presence of two

(Overton v. Tracey.)

witnesses, and contained no covenant except the one implied by the words, "assigned and set over," which would not reach the solvency of the debtor or the sufficiency of the estate mortgaged. The only real matter in controversy is, whether the action could be sustained upon the parol agreement to warrant, and the lawfulness of the consideration of the promise. Other incidental matters arose on the trial, which have given rise to several exceptions, which will be considered in their order.

The first error assigned, is in the admission of the answers of *Constant Williams* to certain interrogatories exhibited by the plaintiff below, the defendant in error, on account of their leading character. Some of these interrogatories had a leading cast, and might, in a certain shape, have been excepted to; but the defendant below joined in the commission, and exhibited his cross-interrogatories to the witness, on the same questions which he now complains of as leading. In chancery, on a return of the commission and publication, if a party neglect to move for a suppression on this ground, he is too late to object on the hearing. Here, having joined in the commission and interrogated on the same questions, I think that he is too late with this exception on the trial. I can see no reason to distinguish this from *Sheeler v. Speer*, 3 Binn. 133, where it was decided, that a party present, and cross-examining, cannot object to leading questions in the deposition, on the trial. It is as much a waiver, as permitting the question to be answered without objection. It is something more than a treacherous silence, which would be acquiescence. It is a positive waiver. I must confess, I am not disposed to lend a ready ear to objections kept in reserve, until it is too late for a party to remove them. It is a snare into which his opponent has led him, and ought not to avail him. In *Jones v. Lucas*, 1 Rand. 368, this very point was decided. It was there held, that where a deposition is introduced on a trial at law, regularly taken on a commission, and an objection is made to some of the questions as leading ones, the court cannot suppress these questions and answers, after the jury is sworn; but the objection should be made before the jury is sworn, and the exceptionable questions and answers suppressed.

The second error assigned, is to the charge of the court, and brings out the question, as to an assignee sustaining such an action on a parol guarantee, where the written assignment contains no such covenant. The objection was not made to the competency of the evidence, as being by parol, to contradict or add to a written agreement, but to its operation when received. The defendant below made no objection to this medium of proof as he ought to have done, but I am willing to allow him the full benefit of the exception; and my opinion is, that the evidence was competent, and, if believed, sufficient to charge him in this form of action.

The evidence was, that *Overton* represented to *Tracey*, that

(Overton v. Tracey.)

the value of the lands in mortgage was double the sum for which they were mortgaged, and that *Drew*, the mortgagor, was in solvent circumstances, and able to pay the amount of the mortgage money; and, in the event of a failure on *Drew's* part, he would be accountable for the value contained in the mortgage and bond, amounting to the sum of fifteen hundred and ninety dollars: That *Tracey* observed to *Overton*, that this guarantee should be reduced to writing; to which *Overton* replied, it was unnecessary, that some witnesses were present who could establish the fact; and that the defendant never was in solvent circumstances, and the property was totally inadequate; that it had been sold on the mortgage, and did not bring more than one-tenth of the debt, and the purchaser at sheriff's sale offered to let *Overton* have it back on the terms he had bought it."

Had this been an assignment, expressed to be without recourse, it would have presented a different question, for then the writing would have shown that all recourse was excluded. But the evidence was of a thing, not in terms contradictory of the deed, but explaining what was intended by the assignment, and that the provision for recourse was particularly stipulated, which was not inserted by the fraud of *Overton*; for a fraud it would be in *Overton*, if *Tracey* insisted on the stipulation being inserted in the instrument, and it was omitted by the persuasion of *Overton*; for him now to avail himself of an omission, of which he was the cause. There is nothing in the instrument inconsistent with this guarantee. So far from this, the courts of *Virginia* hold, that the assignee of a bond, without any express agreement on the part of the assignor, having used due diligence to secure the money, has an implied right to recover by action of *assumpsit*, against the assignor, unless there be an agreement to the contrary, or special circumstances, to show that it was not so intended by the parties at the time of the assignment. The assignment, as they hold, importing, itself, a debt due from the assignor, the right not being given by the act of assembly authorizing the assignment, but existing at the common law; so that unless there is an express stipulation, or something to show the contrary to have been the intention of the parties, the assignor is liable by operation of law. *McLean's Executors v. Davis*, 2 Wash. 219. *Goodwin v. Sterrett*, 2 Hen. & Munf. 189. This, however, is not so considered with us, and is only cited to show, that the stipulation to guaranty, is not inconsistent with the *assumpsit*, though an implied *assumpsit* would not arise by operation of law.

It is not my intention to attempt to reconcile all the decisions on this head of evidence. This would be a difficult task to accomplish, and beyond my powers. It does not, however, follow, that because parol evidence in this case may be admitted, it is therefore admissible in all. But it may be confidently said, that decisions have established the principle, that relief may be granted

(Overton v. Tracey.)

against deeds on the ground of fraud, mistake, oppression, or imposition. The general principle is, that parol evidence, where there is a deed, is not to be admitted in all cases, nor is it to be refused in all. Each must depend on its own circumstances. Where fraud intervenes, there the evidence may be introduced. If it was admitted in all, justice would be subverted. If it was refused in cases of imposition, fraud would be protected. It is one of the most important offices of a court of chancery, and in which it is much employed, to correct mistakes and fraudulent omissions in deeds. The courts do not vary the deed, but if there be a fraudulent omission, it is an equity *dehors* the deed; and when a court of chancery cannot satisfy itself of the fact, an issue may be directed to try the question, as was done in *The South Sea Co. v. Dagliffe*, 2 Ves. 377. *Dagliffe* agreed not to carry goods, under certain circumstances. If information was given in two months after his return home that he had done so, then he was to pay certain damages. The instrument was not drawn up, until on board the ship and in a great hurry, and then executed by *Dagliffe*. When he got out to sea and read it over, he found it was six months instead of two, and brought a bill to be relieved against that variance in the instrument, the company having brought an action on it. Lord KING sent it to an issue, and it was tried on the question, whether it was the original agreement, that it should be two instead of six months: a verdict was given in favour of the plaintiff, that it was designed to be in two months; and, in consequence of this, Lord TALBOT made a decree to relieve the plaintiff against any difficulty by the variation. Undoubtedly there will be found a hesitancy in admitting parol evidence to correct agreements and mistakes, and it ought to be strong and irrefragable evidence; but fraud, in equity, is an exception to every rule; and if the bill in chancery states, that the clause intended to be inserted was suppressed by fraud, chancery never refuses relief on a fraud made out. The only difficulty is in deciding, what should be deemed fraud. If one of the contracting parties insists on a certain stipulation, and desires it may be made a part of the written agreement, and the other by his promise to conform to it, as if it was inserted in the written instrument, prevents its insertion, this is a fraud, and chancery will enforce the agreement as if the stipulation had been inserted. Having no court of chancery, our common law courts have constantly acted upon this principle, from *Thomson v. White*, 1 Dall. 424, to *Christ v. Diffenbach*, 1 Serg. & Rawle, 464, in a succession of decisions varying in their circumstances, but all bottomed upon this principle. It is laid down, in a work of acknowledged authority, (*Sugden on Vendors*, 128.) that *if the parties object to a conveyance, on account of a term of the agreement being omitted, and the party promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.* And this form of action is, with us, in nature of a bill in

(Overton v. Tracey.)

equity, to compel the specific performance of a promise. Here the promise was to make good the mortgage; to make it available; bring the money; or, in the words of the witness, collectable. In the main, this was the charge of the court, and it is free from the imputation of error.

The charge on the second point is likewise free from error. It was not necessary for *Tracey* to give notice to *Overton* of the failure of *Drew* to pay the instalments. It has no relation to notice of nonpayment, in order to charge the indorser of negotiable paper. The interests of commerce require that this should be strictly done; but, in this case, it was the business of *Overton* to look to the ability of *Drew* to pay the debt. The proof was, that *Drew* was never able to pay any thing, as he never had any thing but a yoke of oxen and a cart, and the land was poor and sterile. He should have well known his capacity, when he entered into this voluntary warranty and induced *Tracey*, on his representations, to take the assignment of the debt. His promise was, that the land should bring the money, or, if it did not, he would be accountable for it. In all cases of this kind the rule is plain, if the guarantee proceeds fairly in his prosecution to recover the debt, if he has given notice to the voucher, the record of this proceeding is conclusive. If he does not give notice, it is incumbent on him, on the trial to prove, that he pursued the original debtor with all good faith, and that he failed, not by his own negligence, but because the debtor was never in such a situation that he could probably recover from him. The principle is stated in *Gibbs v. Cannon*, 9 *Serg. & Rawle*, 201, to be, that the guarantor of a note does not stand in the same situation as parties to the note. It is not like an action on the indorsement. It is in the nature of an insurance of the debt, and there is no need of the same proof to charge him, as there is an indorser. It is sufficient for him to show that he could not have obtained the money, by making the demand. The necessity of a demand, in order to charge the indorser of a bill is solely founded on the custom of merchants, and it only applies to actions on the indorsement, which is an action on the bill itself, and does not apply to any case where the guarantor is not an indorser, and the action not on the indorsement. It would follow, from this principle, that the guarantee might recover in this case, on his agreement as to the solvency of *Drew*, and the adequacy of the mortgaged premises, and that without notice of the nonpayment of the instalments, as they become due, unless indeed it had been proved, which was not pretended, that *Overton* had received prejudice from the want of notice, or could have received benefit from notice. The poverty of *Drew* was proved, his inability to pay was not contradicted by any witness, nor was it proved that the land had grown more sterile, or was deteriorated by *Drew*. *Overton* assumed to pay, if *Drew* did not; and, if the money could not be raised by a sale of the land, he

(Overton v. Tracey.)

ought to have taken notice. It was necessary neither to allege, nor to prove it. 5 *Com. Dig.* 53. *Cro. Jac* 68. It is a duty which the law enjoins on such guarantor, to see that the debt is paid. *King v. Bulawin*, 2 *Johns. Ch.* 559.

This answers the fourth assignment of error. He was not bound to bring an action on each instalment as it became due, because it would have been a fruitless act, and because *Overton* guarantied that the mortgaged lands should bring the debt on a sale under the mortgage. Neither party, it would seem, looked to the solvency of *Drew*, but to the solvency of the land,—that the money should be collectable from the land.

The fifth specification is, that the court erred in the opinion, that the plaintiff was not bound by the statute of limitations until six years after the last instalment became due. If this had been an action of deceit on *Overton's* false representation, the opinion would have been erroneous; but it was on his assumption with respect to the security of the mortgage being an available one. *Tracey* could not proceed to sue on the mortgage until one year after the last instalment became due. Until the property was sold, it could not be known but that it would be available. The deficiency could no otherwise be ascertained. The cause of action did not accrue until that was ascertained, and until the cause of action accrued, the statute would not begin to run. The proper plea, in such case, would not be *non assumpsit infra sex annos*; but *causa actionis non accrevit infra sex annos*.

The sixth point. If this had been the assignment of the bond and mortgage, in consideration of the sale and conveyance of a title under *Connecticut*, to one not holding or representing the *Pennsylvania* title, the consideration would have been illegal, and no action would have grown out of it. It is a matter in which the *Pennsylvania* legal owner must rejoice equally with the *Connecticut* pretender, that this bone of contention no longer exists. It had distracted the state for nearly forty years. It had nearly caused a civil war. Some valuable lives were lost in the contest. It is now happily settled, I must say with great sacrifice of the *Pennsylvania* rights; but it is settled, and I shall regret to see its remembrance kept alive by a construction which would do no credit to the *Pennsylvania* claimant, for the plea is a most ungracious one; but ungracious as it may be, still, if the contract falls within the letter and policy of the acts protecting the sale and transfer of *Connecticut* titles, it must be sustained. The act of the 11th of *April*, 1795. 3 *Sm. L.* 209, is for the punishment of intruders under the *Connecticut* pretensions, and persons combining and conspiring for the purpose of conveying, possessing, or settling within the limits of *Pennsylvania*, under such titles. This transaction cannot fall under this act. It savoured not of an intrusion under the *Connecticut* title, nor was it a combining for conveying, possessing, or settling under such title, but was the

(Overton v. Tracey.)

very reverse; the surrender up and extinction of that title. The act on which the plaintiff in error relies, is the act of the 6th of April, 1802, 3 Sm. L. 525. If we look to the objects of the legislature, as they appear in the title and are stated in the preamble to that act, they prove any thing else than an intention of the legislature to prevent the holder of the *Pennsylvania* title from settling down on his land, peaceably obtaining a surrender of the possession of the *Connecticut* intruder. It is entitled, "an act to maintain the territorial rights of the state, and to protect the property of persons holding lands under the same;" and the preamble states, that "certain persons, under pretence of titles derived from *Connecticut*, have endeavoured by improper pretences, to defame the titles of persons holding lands by grant from this state, &c., in order to counteract such practices, and preserve the just rights of the state," it enacts that no conveyance of lands within the counties of *Luzerne*, *Lycoming*, and *Wayne*. shall pass any estate, where the title is not derived from this state, and inflicts a penalty on any judge or justice for receiving proof of, or recorder for recording a deed of that description, and forbids every one interested in a *Connecticut* title, from sitting as a judge or juror in any case where such title may come in question; and it lastly provides, that every person settling, or purchasing, or in any manner contracting for land under the *Connecticut* title, shall forfeit two hundred dollars. The object of this act was to maintain the territorial rights of the state, protect the property of persons holding under the state, and cut up the *Connecticut* titles by the roots. But I am far from considering it to be an infraction of that law, for a *Pennsylvania* holder to agree with a settler under the *Connecticut* title to surrender the possession to him, the rightful owner. The improvements, buildings, and crop in the ground might be worth more than the sum given for the surrender. There was nothing in a moral or legal point of view vicious in the *Pennsylvania* rightful owner, agreeing to pay the *Connecticut* man for his labour of many years on his lands, however unlawful his original entry may have been, nor in the *Connecticut* man abandoning that, which, at one time, he might have conscientiously settled, under the belief that the *Connecticut* title was valid. Though it must be admitted, after the decree made at *Trenton*, to have been a most extraordinary delusion, yet I will not say, that such infatuation was impossible. Nor can I perceive any thing in the transaction against the letter, spirit, or policy of any act of assembly, forbidding the *Connecticut* settler, saying to the *Pennsylvania* landholder, "I am sick of this strife, I am not willing longer to hold out against your title and the laws of this state; pay me the value of my permanent improvements, my buildings, and my crop in the ground; I will move off; I will go further into the wilderness, and acquire a lawful and rightful possession." There is nothing in an agreement founded on these considerations for-

(Overton v. Tracey.)

bidden by any law. Nor for the legal owner to say, "Surrender your possession, and I will pay you for the labour you have spent upon my land; go away in peace, and I will pay you for your crop." If this was all, there would be nothing forbidden. It cannot render it vicious, because the *Connecticut* man surrenders with his improvements, every vestige of claim, every worthless rag of conveyance. There is so much natural justice in this, it so much tends to accomplish that which the state had at heart, for which she sacrificed so much, the establishment of peace in her borders, that I shall be sorry to find in the pages of any of her laws a provision of this kind, which would ever subject the holder of the *Pennsylvania* title to a forfeiture of two hundred dollars for doing that which his interest and conscience dictated to him, by a correct, beneficial, pure, and proper arrangement, consistent with the true policy of the laws against these intruders, and the true interest of the commonwealth.

This was not a matter of law, depending upon the legal construction of the writing alone. Facts *dehors* the deed were to be considered, before it could be pronounced whether the parties to the contract transgressed any law. To do this, it was necessary to ascertain the situation of the parties, and there the jury were properly instructed by the court, that if they found that *Overton* represented, or was in truth the owner of the *Pennsylvania* title, and *Tracey*, who had made permanent and valuable improvements under the *Connecticut* title, contracted for the surrender of these to the rightful owner of the soil, and that this, and not the *Connecticut* title, was the consideration for the assignment of *Drew's* bond and mortgage, then the plaintiff was entitled to recover. The jury would judge, from the amount of the consideration, whether it was the value of a fee simple title, or merely a compensation for improvements. There was evidence to show, that it was the surrender of the possession and improvements to the *Pennsylvania* right that was the consideration of the assignment, and not an act hostile to the sovereignty of the state, or her territorial rights, or defaming the title of persons holding by grant from the state; but a submission to the state and her laws, by a surrender of all hostile pretensions; not receiving compensation or allowance for the soil, supposing it to be in *Tracey*, but a compensation agreed to be made by him who was to be benefited by them, for the substantial improvements made on his land, to him who made them.

The plaintiff in error has failed in sustaining any of his exceptions, either to the evidence or the opinion of the court, and the judgment stands affirmed.

Judgment affirmed.

[SUNBURY, JULY 5, 1826.]

GORDON *against* BULKELEY.

IN ERROR.

One who has only a parol authority for the purpose, cannot bind his principal by affixing, in his absence, his name and seal to a bond.

WRIT of error to the Court of Common Pleas of *Tioga* county, in an action of debt brought by *Israel Bulkeley*, the defendant in error, against *Groves Gordon*, the plaintiff in error, upon a bond, purporting to have been given by *John Gordon* and the said *Groves Gordon*, to the said *Israel Bulkeley*, constable of *Tioga* township, in the county of *Tioga*, for one hundred and fifty dollars, conditioned that the said *John Gordon* should appear at the next Court of Common Pleas of *Tioga* county, to abide the final decision of the said court, &c., and to comply with all things required by law to procure his discharge, under the acts of assembly for the relief of insolvent debtors. The bond was signed and sealed by *John Gordon*, and acknowledged by him alone before a judge of the court; and it appeared that the name and seal of *Groves Gordon* were affixed in his absence, in pursuance of a parol authority from the said *Groves Gordon*, the surety and co-obligor in the bond.

The defendant pleaded, *non est factum*; and, upon this issue, the court below was of opinion, that the bond was well executed by the said *Groves Gordon*.

Ellis and *Lewis*, for the plaintiff in error, cited, *Cooper v. Rankin*, 5 Binn. 615. *Co. Litt.* 48, b. 1 *Bac. Ab.* 199, 287. *Bellas v. Hayes*, 5 Serg. & Rawle, 437. *Big. Dig. Mass. Rep.* 28, No. 1, 4.

Williston, contra, cited, *Stahl v. Berger*, 10 Serg. & Rawle, 170.

The opinion of the court was delivered by

ROGERS, J. The single question, in this case, is whether a bond can be executed in the absence of one of the obligors, by the other signing the name of the absent obligee, and affixing his seal, having but a parol authority to do so?

Public convenience requires, that one man should have power to authorize another to execute a contract for him, as the business may be frequently as well performed by attorney, as in person. But it is a general rule, that such delegation, or authority, must be by deed, that it may appear that the attorney or substitute had a commission or power to represent the party; and, further, that it may appear that the authority was well pursued. 1 *Bac. Ab.* 199. *Co. Litt.* 48, b.

But this is said to be different from a letter of attorney, and, in some respects, it may be distinguished from the cases cited; but

(Gordon v. Bulkeley.)

there is no difference in principle. Great abuse might arise, if one man, and particularly an insolvent debtor, should have it in his power to bind another in *his absence* by so solemn an instrument as a deed, with a mere parol authority. In such a case, society would be too much exposed to the designs of the artful and unprincipled, supported, as they would frequently be, by the testimony of confederated and perjured witnesses. The distinction has been taken between a sealed and an unsealed instrument, between a bond and a promissory note. No man can bind another by deed, unless he has been authorized by deed to do it; and if a person, however authorized, if not by an instrument under seal, make and execute a deed, expressed to be in behalf of his principal, the principal is not bound by the deed, although he who made it is bound. *Banorgee v. Hovey et al.*, 5 Mass. Rep. 11. *Hatch v. Smith*, 5 Mass. Rep. 52.

A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal. *Stackpole v. Arnold*, 11 Mass. Rep. 27. *Long v. Colburn*, 11 Mass. Rep. 97. *The President, &c. of Northampton Bank v. Pepoon*, 11 Mass. Rep. 288.

The distinction then appears to be clearly taken, between a contract under seal and a simple contract, and I feel no disposition to extend the law, believing that public policy requires that the operation of a parol authority should be rather restricted than enlarged. The case we have now under consideration is an exceedingly strong one; an insolvent debtor, attempting to bind another as his surety by bond, in the absence of the surety, and with but mere parol authority to do so. As then *Groves Gordon* was not present when the bond was executed, and *John Gordon* had no written authority to execute the bond, I am of opinion, that, although it is the bond of *John Gordon*, yet it is not the bond of *Groves Gordon*, the surety. 9 Johns. 285.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE, 1826.]

SCOTT *against* GALLAGHER and another.

IN ERROR.

The *bona fide* purchaser of the legal title, is not affected by a secret trust, of which he has not direct, express, and positive notice. The possession of a *cestui que trust*, and the exercise by him of every act of ownership, is not such notice. The possession of the *cestui que trust* becomes adverse, and the act of limitations begins to run, from the time the legal title is conveyed in violation of the trust.

WRIT of error to *Mifflin* county.

The opinion of the court, in which the facts of the case are fully stated, was delivered by

ROGERS, J. This was an action of ejectment, brought the 14th of *March*, 1825, to the *April* Term, by *James Scott*, against *Robert C. Gallagher* and *James Howell*, to recover the possession of one hundred acres of land. The title to the premises was regularly deduced to a certain *Thomas Gallagher*, under whom the plaintiff and defendants claim title. *Thomas Gallagher* and wife, on the 21st of *November*, 1786, by a deed absolute on its face, and purporting to be for a valuable consideration, conveyed the premises to *Duncan M. Cormick*. The deed was regularly acknowledged and recorded. *Duncan M. Cormick*, on the 29th of *November*, 1786, eight days after the above transaction, executed a bond to *Thomas Gallagher*, the condition of which was, "That *Duncan M. Cormick* should sell the above described tract of land, in the city of *Philadelphia*, and should make a true return of the value thereof, either in money or shop goods, after his return from *Philadelphia*, on the 1st of *February*, next succeeding; that if he should be unable to sell the lands, then he would return to *Thomas Gallagher* the conveyance and original deeds, delivered by *Gallagher* to *M. Cormick*." The property was not to be sold for less than one hundred pounds cash, or one hundred and thirty pounds in store goods. *Duncan M. Cormick* went to *Philadelphia*, but never returned to *Mifflin* county, and did not sell the property, nor did he ever reconvey, or return the conveyance or original deeds to *Thomas Gallagher*, nor does it appear that any measures were taken by *Gallagher* to compel him so to do. The possession of the property was not transferred by *Gallagher* to *M. Cormick*, nor did the purposes of the trust make it necessary that the possession should be transferred; on the contrary, it does appear that *Thomas Gallagher* resided on an adjoining tract, that he cleared some land in this tract, that a house was built on the property, and that he, *Gallagher*, and those claiming under him, have been in the continued possession of the property, exercising every act of ownership over it, until the commencement of this suit. Matters remained in this situation until the 11th of *August*, 1788, when,

(Scott v. Gallagher and another.)

by his last will and testament, of that date, *Duncan M'Cormick* "gave and bequeathed to *Richard Butler* and wife, whom he appoints his heirs, all his property and estate." On the 15th of *December*, 1789, *Richard Butler* and wife, for the consideration of one hundred pounds, conveyed the property to *John Rittenhouse*. This deed was regularly acknowledged, but not recorded until the 11th of *November*, 1814. On the 12th of *July*, 1790, *John Rittenhouse* conveys to *Elizabeth Rittenhouse*, whose heirs, (*Elizabeth* having died,) for the consideration of one hundred and forty-two dollars, convey the property in dispute to *James Scott*, a citizen of *New Jersey*, and the plaintiff in this suit.

It is conceded, that unless *Scott* had notice of the secret agreement between *Gallagher* and *M'Cormick*, he cannot be affected by it; but it is contended, that the circumstances above stated amount to notice to him, and the whole world, that he, *Thomas Gallagher*, and those claiming under him, were the owners of the equitable interest in the land. Courts of justice view secret agreements with a jealous and scrutinizing eye. The owner of the legal title should have direct, express, and positive notice, otherwise he takes the property discharged of the trust, which existed between the original parties. There would be no hardship in the case, on *Gallagher*, because it was his own folly to place himself and others in the power of *M'Cormick*. If any person suffers, it should be *Gallagher*, and not *Scott*, for this plain and obvious reason, that he has been the cause of the loss sustained. Equity says, If one of two innocent persons must suffer, he who has been the cause shall bear the loss. Had, then, *Scott* such a notice of this agreement as to affect him? It is said that he had, because *Gallagher* continued in possession, and received the rents and profits of the property until the commencement of this suit. How this can be notice of a secret agreement between *Gallagher* and *M'Cormick*, I am at a loss to conceive. *Scott*, who lived in the state of *New Jersey*, looked only to the deed in fee simple, given by *Gallagher* to *M'Cormick*, regularly recorded, and which never was divested by a deed of reconveyance from *M'Cormick*. He is not bound to call on the person who is in the possession of the land, to inquire of him whether he has a secret agreement with the owner of the legal title. If there be an agreement, it is the duty of the tenant in possession to spread it upon the records of the county, in order to prevent innocent purchasers from being deceived. A. sells a tract of land to B., and retains the possession; B. sells to C.; C. is not bound to call on A. to know whether there is not a secret agreement, adverse to the deed from A. to B. between them. He would be bound only by those agreements which are consistent with his deed, such as a retention of the possession or payment of rent. In this case, it does not appear that *Gallagher* ever took any steps whatever, to obtain a reconveyance of the land, or a surrender of the deeds placed in the hands of *M'Cormick*. He rests merely upon his

(Scott v. Gallagher and another.)

possession, without having given any notice whatever of the real nature of the transaction between him and *M'Cormick*, or making any application to the court for a rule on *M'Cormick*, to compel him to reconvey and redeliver the deed placed in his hands. If we had a Court of Chancery, *Gallagher's* duty would have been perfectly plain. It would have been incumbent upon him, instead of resting on his possession, merely to have applied to have a reconveyance of the land, and a return of the deeds. If this had been neglected by him, he would have appeared with a bad grace in a court of justice, in a dispute with a *bona fide* purchaser, without express notice of the secret agreement between him and *M'Cormick*. But it may be said, that the courts have no such power in *Pennsylvania*. If they have not, of which I am by no means satisfied, it shows a most obvious and glaring defect in our laws. Until the point is fairly brought before me, I am not to be understood as expressing any opinion, although I confess the inclination, of my mind is, that the courts have the power of administering relief, and that in cases which I can readily suppose, it would be a dereliction of duty not to exercise it, so as to do exact and equal justice between the parties. In this case, however, has *Gallagher* done all he could or ought to have done? Has he given any notice of the secret agreement? Has he commenced trover or detinue to recover the papers from *M'Cormick*, or an action on the case, to recover damages for the nonperformance of the agreement? He has rested on his possession, and the consequence has been, that the land has been purchased by *James Scott*, who resided in the state of *New Jersey*, from the person who was the owner of the legal title to the land, without any *express notice* of the secret agreement between him and *M'Cormick*. Inasmuch, then, as it does not appear that *Scott* had express notice of the agreement, I am of opinion, if there were nothing else in the case, *Scott* would be entitled to recover.

The defendants, however, further rely on the act of limitations. In the case of *Pipher v. Lodge*, 4 *Serg. & Rawle*, 315, the Chief Justice lays down this principle, that while the possession can be reasonably supposed to be in accordance with the trust, it should be construed for the benefit of the *cestui que trust*, and consequently the act of limitations would have no operation. This principle applies to the period which elapsed from the time of the conveyance to *M'Cormick*, until the object of the trust was effected, or, at any rate, until the 1st of *February*, 1787. Until that time, the possession of *Thomas Gallagher* was consistent with the agreement. It was not adverse, and consequently, in the language of the Chief Justice, the act of limitations would have no operation. Indeed, it appears to have been the manifest intent of the parties that the possession should be surrendered, only to a *bona fide* purchaser, from *M'Cormick*. *Duncan M'Cormick* sold the property, nor is it clear to me that he ever intended to

(Scott v. Gallagher and another.)

bequeath it. Charity would say, he did not; for a contrary supposition would make him sin in his grave. It would be a gross fraud on *Gallagher*. On the 15th of *December*, 1789, *Butler* and wife, who, the plaintiffs say, were the devisees of *Duncan M'Cormick*, convey this property to *John Rittenhouse*. Can then, from this period, the possession of *Thomas Gallagher* be reasonably supposed to be in accordance with the trust? In the same case of *Pipher v. Lodge*, 4 *Serg. & Rawle*, 570, Justice GIBSON says, in the case of an express trust, a good reason always appears upon the face of the trust itself, why the *cestui que trust* should not call for the possession, and therefore no laches is imputable to him; but when he is entitled to the possession, and neglects to call for it, and can assign no reason why he did neglect, the case is very different. I should hold the possession adverse, from the moment he was bound to execute the deed, and surrender the possession. Here, in this case, I hold the possession adverse from the time *Butler* and wife executed the deed to *John Rittenhouse*. At that time, they had a right of entry, which they have neglected to enforce for nearly twenty-six years, without giving any reason for their neglect. This case, indeed, presents the singular spectacle of a man exercising every act of ownership on the land, for a space of nearly twenty-six years, without any steps being taken to enforce the adverse right, or indeed any intimation, so far as we know, that any such claim existed. On the latter ground,—that of the act of limitations,—I am of opinion the plaintiffs are not entitled to recover.

It will be observed, that I express no opinion of what the law would be on the agreement, even if *Scott* had express notice of the agreement. It would be a matter well worthy of consideration, the act of limitations being out of the question, whether the agreement could affect *Scott's* title; or, in other words, whether *Gallagher's* heirs would not be entitled to the money, and not the land.

Judgment affirmed.

[SUNBURY, JULY 8, 1826.]

KITCHEN and others *against* FUNSTON and another.

IN ERROR.

In a *scire facias* against the heirs of A., and the terre-tenants of lands which belonged to him, issued upon a judgment obtained against him in his lifetime, an award of arbitrators, under the act of the 20th of *March*, 1810, in favour of the plaintiff, for a certain sum, "to be levied of the lands of A., deceased, or that descended to the heirs through or by virtue of him, the said A., deceased," is bad for uncertainty.

ON the return of the record of this case, from the Court of Common Pleas of *Northumberland* county, several errors were assigned, which were argued by *Frick* and *Bellas*, for the plaintiffs in error, and by *Marr*, for the defendants in error. The opinion given by this court, however, renders it unnecessary to state them.

PER CURIAM. This was a *scire facias* issued by *John* and *Nicholas Funston*, against *Henry Kitchen* and others, heirs and terre-tenants of land which was the estate of *William Kitchen* the elder, deceased, on a judgment obtained against him in his lifetime by the said *J. and N. Funston*. The cause was submitted to arbitration, under the compulsory arbitration act, and the arbitrators reported as follows: "We find for the plaintiffs one hundred and thirty-six dollars and fifteen cents, to be levied of the lands of *William Kitchen*, deceased, or that descended to the heirs through or by virtue of him, the said *William Kitchen*, deceased. And the said plaintiffs to relinquish their claim to *Eves's* judgment."

Several errors have been assigned, the only one of which, of any weight, is that the report of the arbitrators is uncertain. And it is the opinion of the court that this is a fatal exception. This report, by virtue of the act of assembly under which it was made, has the effect of a judgment, and therefore should have the certainty of a judgment. If it had been in favour of the plaintiffs, to be levied on the lands which descended to the defendants, as heirs of their father, *William Kitchen*, it might have been supported. But it is not so,—it is to be levied on all the lands which descended *by, through, or by virtue of their father*. Now, there is no saying what this means, or to what extent the judgment may be carried. Lands may possibly have descended to the defendants from their grandfather, and these might be said, to descend *through, or by virtue of their father*; and yet, certainly, they would not be liable to execution for a debt of their father. If the judgment should stand, it might lead to an immediate dispute, concerning the lands intended to be included in it. This would be extremely inconvenient, and is, indeed, inconsistent with the

(Kitchen and others v. Funston and another.)

nature of a judgment on an award. It is our opinion, therefore, that the judgment should be reversed, and the record remitted to the Court of Common Pleas, to be further proceeded in according to law.

Judgment reversed, and record remitted, &c.

[SUNBURY, JULY 8, 1826.]

WILLIAMS and another, Supervisors of Loyalsock Township,
against LANDON.

IN ERROR.

In an action against the commissioners of a township, an award of arbitrators, that the defendants shall pay to the plaintiff a certain sum, "as soon as the defendants should be in possession of the township funds to do so," is uncertain and bad.

ON a writ of error to the Court of Common Pleas of *Lycoming* county, it appeared that *Daniel Landon*, the plaintiff below and defendant in error, brought this action on the case against *Joseph Williams* and *William Fulmer*, supervisors of *Loyalsock* township, for the recovery of one hundred and forty-five dollars and sixty-two cents, due to him as a former supervisor of the same township. His account had been settled by auditors appointed according to law, who gave an order on the defendants, the present supervisors, to pay this sum to the plaintiff. This cause was submitted to arbitrators, who awarded, "that the defendants should pay to the plaintiff the sum of one hundred and eighteen dollars and thirty-three cents, as soon as the defendants should be in possession of the township funds to do so." The plaintiff issued a *fieri facias* on this award, and levied on two horses, the property of *Joseph Williams*, one of the defendants.

The defendants thereupon took out a writ of error; and the record being returned,

Campbell, for the plaintiffs in error, contended, 1. That the Court of Common Pleas had no jurisdiction of the cause, the act of assembly of the 6th of *April*, 1802, *sect.* 4, 12, *Purd. Dig.* 719, having given a remedy which ought to have been pursued. The case, he said, was not within the words, but the spirit of the act. 1 *Serg. & Rawle*, 505. *Lyon v. The Commissioners of Cumberland county*, 4 *Serg. & Rawle*, 443.

2. That the award, not being positive, but that the defendants shall pay upon a contingency, which may never happen, was void for uncertainty. *Shoemaker v. Meyer*, 4 *Serg. & Rawle*, 452.

Vanhorn, for the defendant in error, insisted, that the award was sufficiently certain, and cited, 5 *Serg. & Rawle*, 167. *White*

(Williams and another, Supervisors of Loyalsock Township, v. Landon.)

v. Jones, 8 Serg. & Rawle, 349. 2 Dall. 211. 1 Dall. 174, 378. 6 Binn. 34.

PER CURIAM. On the part of the plaintiffs in error, it was contended that the award in this case was erroneous, because the defendant was not to pay the money immediately, or certainly, but at a future time and on an uncertain event.

The act of assembly which gives to the report of arbitrators the effect of a judgment, must have intended such a judgment as would authorize the plaintiff to take out an execution. But no execution could be taken on this award, because the money was to be paid *in futuro*, and upon a *contingency*. It might be, that the defendants would never be in possession of the township funds sufficient to discharge the judgment. They might both die before funds came to their hands. If the award had been, that the defendants should pay to the plaintiff a certain sum, with stay of execution till a certain time, it would have been good, because then it would have operated as a judgment for that sum, *absolutely* and *immediately*. It is very common for judgments to be entered in the courts of common law, with stay of execution; and such a judgment as might be rendered in a court of common law in *Pennsylvania*, may be rendered by the report of arbitrators. We think the principle which must govern the case before us, was decided in *Shoemaker v. Meyer*, 4 Serg. & Rawle, 452. There, the arbitrators awarded, that the defendant should pay to the plaintiff the sum of one thousand six hundred and thirty-five pounds and twelve shillings, "*in twelve annual payments, commencing on the 1st of April, 1815.*" That case, indeed, was stronger than the present, because there was no contingency. The only objection was, that the payments were to be *in futuro*. It is the opinion of the court, therefore, that the report in the present case was erroneous, and the judgment should be reversed,—of course the execution must follow the fate of the judgment. The record is to be remitted to the Court of Common Pleas, to be further proceeded in according to law.

Judgment reversed, and record remitted, &c.

END OF JUNE TERM, 1826—MIDDLE DISTRICT.



CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM, 1826.

[PITTSBURG, SEPTEMBER 12, 1826.]

RIDDLE *against* ALBERT.

IN ERROR.

In an ejectment for land west of the river *Allegheny*, claimed by the plaintiff under a warrant and survey, without settlement, the defendant has a right to show that the legal title has been granted to him by the commonwealth, without having shown that he had taken out a vacating warrant, agreeably to the act of the 3rd of April, 1792.

Quære, Whether a vacating warrant be essential, where it appears that when the settler was about to make his settlement, he was assured, upon inquiry of the deputy surveyor of the county, that there had been no prior appropriation of the land.

On the return of a writ of error from the Court of Common Pleas of *Butler* county, it appeared that this was an ejectment, brought by *Adam Albert*, the defendant in error, against the plaintiff in error, *James Riddle*, for two hundred and fourteen acres of land lying west of the river *Allegheny*, in *Muddy Creek* township, in the said county. The plaintiff's claim was founded upon a warrant in the name of *Robert Elder*, for four hundred acres of land, dated the 1st of *March*, 1794, on which a survey was made on the 28th of *May*, 1795, of three hundred and fourteen acres and twenty-five perches, embracing the land in controversy. The title of the warrantee was regularly deduced to the plaintiff. No settlement had been made upon any part of this land, nor a patent obtained by the plaintiff, or those from whom his claim was derived.

(Riddle v. Albert.)

The defendant claimed under an improvement commenced in the winter of 1798-9, by *John Boon*, continued in 1799 by *Andrew Gilleland*, and kept up by him and those who claimed under him, until the commencement of the action. It was further proved, that *Andrew Gilleland* had applied to the deputy surveyor of the county to have a survey made, with a view to obtain an office title to the land. After diligent search among the documents in his possession, the deputy surveyor found, that although there was a warrant entered in the name of *Robert Elder*, no survey upon it had been made. He therefore made the survey, and certified that *Andrew Gilleland* was living on the land, and that it was not appropriated to any warrant.

The defendant then offered in evidence a warrant in his own name, dated the 25th of *March*, 1818, a survey thereon, dated the 13th of *April*, 1818, and a patent, dated the 13th of *May*, 1818. The plaintiff's counsel objected to their being given in evidence. The court rejected the testimony, on the ground that the defendant had not taken out a vacating warrant; and the defendant's counsel excepted to their opinion.

The defendant again offered the same evidence, to show that he entered under a claim of title. But the court again rejected it, and another exception was taken.

The plaintiff, it appeared, had purchased, also, by articles of agreement, of one *Shannon*, who claimed under *Gilleland*.

At the conclusion of the trial, the defendant's counsel requested the court to charge the jury in the following manner:—

“1. That the plaintiffs, having purchased under *Andrew Gilleland*, cannot recover until the contract of sale is rescinded; and that by purchasing an adverse title, he cannot contest *Gilleland's* title until he leaves the possession acquired under him.

“2. That *Gilleland's* possession, and actual settlement, for twenty-one years before the suit brought, give him a right under the act of limitations.

“3. That while *Albert* lives on the land, his possession is the possession of *Gilleland*, and enures to his benefit against any adverse title.”

SHALER, President, charged the jury, in relation to these points, as follows:—

“1. If the jury find, that the plaintiff did purchase one hundred acres of land in the original survey, from the assignee of *Andrew Gilleland*, that will not bar his recovery of the rest of the tract, there being no dispute about the said hundred acres.

“2. An adverse possession, in order to bar a recovery under the statute of limitations, must be hostile in its inception, and continue so for twenty-one years. It must also be marked by definite boundaries. The statute of limitations will cease to be operative from the time the plaintiff took possession of the land adversely to the defendant; and if the jury find, that at any time

(Riddle v. Albert.)

during the twenty-one years, the plaintiff entered under his present title, the statute of limitations forms no bar to the plaintiff's recovery. A mere entry to make a survey, is a sufficient entry to prevent the statute from running.

"3. That as soon as *Albert* held adversely to *Gilleland*, provided the jury think there is evidence of his having so held adversely, his possession would not be the possession of *Gilleland*, so as to entitle him to the benefit of the limitation."

To this opinion the counsel of the defendant excepted.

Fetterman and *Baldwin*, for the plaintiff in error.

1. The warrant, survey, and patent offered by the plaintiff in error, ought to have been admitted in evidence. His case was very special in its character. *Gilleland* applied to the deputy surveyor, and was informed that the land was unappropriated. The warrantee had never made a settlement, and therefore the land was open to a vacating warrant; but the settler was excusable for not taking out a vacating warrant, because he could not know that a survey had been made under a prior warrant. He did all he could, and, as he was in no fault, he ought to be considered as having actually taken out a vacating warrant. But the warrant and survey and patent, were evidence at least to show that the defendant below entered under colour of title, and might therefore protect himself under the act of limitations.

2. The charge of the Court of Common Pleas was erroneous. After having made the purchase under *Gilleland*, *Albert* could not, by purchasing another title, stop the running of the act of limitations in favour of *Gilleland*. *Albert's* possession was the possession of *Gilleland*, notwithstanding he purchased the title of *Elder*. *Caufman v. The Cedar Spring Congregation*, 6 Binn. 62. *Smith's Lessee v. Stewart*, 6 Johns. 34, 36. 10 Johns. 223, 292. 13 Johns. 116. *Brown's Lessee v. Ayers*, 14 Johns. 224. 18 Johns. 94. 11 Serg. & Rawle, 339. 4 Serg. & Rawle, 467. 5 Serg. & Rawle, 236.

Ayres, for the defendant in error.

1. When *Gilleland* entered to make a settlement, there was a title in *Robert Elder* by warrant and survey. The warrant, survey, and patent of the defendant below were therefore against law, and void, and gave no colour of title. They, therefore, ought not to have gone to the jury. If they gave colour of title, it could only be from the date of the patent, which being less than twenty-one years from the commencement of the suit, no title could be gained under the act of limitations. On this ground, also, these documents were properly rejected. *Miller v. Shaw*, 7 Serg. & Rawle, 129. *Skeen v. Pearson*, 7 Serg. & Rawle, 303.

2. The charge was correct. The purchase of one hundred acres would not prevent the purchaser from buying the residue of the tract from another person, whose title was adverse to that of the vendor of the one hundred acres. These one hundred acres were

(Riddle v. Albert.)

laid off by metes and bounds. *Gilleland*, before his survey in 1818, was a trespasser, and therefore his possession did not extend beyond his actual enclosures.

3. The charge of the court, upon the second point submitted to them, was, that if the plaintiff entered under title adverse to *Gilleland*, at any time within twenty-one years before suit brought, the act of limitations was not a bar. And the law is certainly so. The court meant an entry into the two hundred and fourteen acres which was the subject of the ejectment.

4. If the opinion of the court on the third point related to the one hundred acres, concerning which there was no dispute, and for which the ejectment was not brought, it is wholly immaterial whether there is error in it or not, because it does not concern the present action. *Pipher v. Lodge*, 4 *Serg. & Rawle*, 315. The cases cited on the other side, to show that where one person comes in under another he shall not dispute his title, do not apply, because the plaintiff never entered under *Gilleland*, into the two hundred and fourteen acres, which is the only land in dispute.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an ejectment for two hundred and fourteen acres of land, lying west of the *Allegheny* river, brought by *Adam Albert*, the plaintiff below, against *James Riddle*, the plaintiff in error. The plaintiff claimed under a warrant for four hundred acres of land to *Robert Elder*, dated to *March*, 1794, on which a survey was made of three hundred and fourteen acres and eighty-five perches, including the land in dispute, on the 28th of *May*, 1795. A regular chain of title to this warrant and survey was deduced from the warrantee down to the plaintiff, but no part of the land had been settled, nor any patent obtained by the plaintiff, or those under whom he claimed.

The defendant gave in evidence a settlement, under which he made title, sometime in the year 1798 or 1799; and offered in evidence a warrant to himself, dated the 25th of *March*, 1818, a survey on the 13th of *April*, 1818, and a patent on the 13th of *May*, 1818; to the evidence of which warrant, survey, and patent, the plaintiff objected, and the court rejected it. The defendant relied also on the act of limitations, and gave parole evidence in support of that defence. The reason for rejecting the defendant's evidence was, that although the plaintiff had not complied with the terms of settlement imposed by the act of the 3d of *April*, 1792, under which his warrant was issued, yet it was necessary for the defendant to take out a vacating warrant before he could affect the plaintiff's title. Whether the defendant's title would have been good, on the disclosure of all the circumstances of his case, is not now to be decided; but surely he had a right to show, that the legal title had been granted to him by the commonwealth. This has always been the course of proceeding, and, when all the evidence

(Riddle v. Albert.)

has been given on each side, it is for the court and jury to decide whether the legal estate granted by the patent shall yield to the equitable right of the adverse party. There was error, therefore; in rejecting the defendant's evidence, for which the judgment must be reversed. I think it proper to suggest to the defendant's counsel, that when the cause comes to trial again, it may be very material to produce the survey, which I presume was obtained by *Adam Gilleland*, under whom the defendant claims, when first he entered on the land for the purpose of making a settlement. It appears, from the evidence in this cause, that although the said *Adam Gilleland* made inquiry at the office of the deputy surveyor of the county, no information could be obtained of any warrant and survey, appropriating the land on which he was about to settle. On the contrary, the deputy surveyor assured him there had been no appropriation; and whether, under such circumstances, a vacating warrant was essential, is a point worthy of consideration.

The judgment is to be reversed, and a *venire de novo* awarded.

[PITTSBURG, SEPTEMBER 12, 1826.]

WILKINSON *against* GREY.

IN ERROR.

On an award of arbitrators in *trespass quare clausum fregit*, in favour of the plaintiff for one dollar and the *costs of suit*, the plaintiff is entitled to full costs.

WRIT of error to the Court of Common Pleas of *Allegheny* county.

The case was argued, in this court, by *Burke* for the plaintiff in error, who cited, *Act of the 27th of March, 1713, Purd. Dig.* 531. *Roberts's Dig.* 138. *Lewis v. England*, 4 *Binn.* 11. *Stuart v. Harkins*, 3 *Binn.* 321. *Guier v. M'Faden*, 2 *Binn.* 587. *Spear v. Jamieson*, 2 *Serg. & Rawle*, 530. *Lentz v. Stroh*, 6 *Serg. & Rawle*, 34. *Act of the 28th of March, 1814, Purd. Dig.* 460. And by

Fetterman, for the defendant in error, who referred to *Hinds v. Knox*, 4 *Serg. & Rawle*, 417. *Gower v. Clayton*, 6 *Serg. & Rawle*, 85.

PER CURIAM. This was an action of *trespass quare clausum fregit*, brought by *Josiah Grey*, the defendant in error, against *James Wilkinson*. It was referred to arbitrators, who awarded in favour of the plaintiff one dollar and the costs of suit. The defendant contended, that the plaintiff was not entitled to more

(Wilkinson v. Grey.)

costs than the amount of the damages awarded by the arbitrators, viz. one dollar; but the Court of Common Pleas gave judgment for all the costs, and that is the error complained of. This very point was decided by this court in the case of *Hinds v. Knox*, 4 *Serg. & Rawle*, 417. It was there held, that if the jury give damages under forty shillings and full costs, in *trespass quare clausum fregit*, judgment shall be entered for full costs. The case of *Lewis v. England*, 4 *Binn.* 11, on which the defendant's counsel relies, was quite different. There the defendant appealed from the judgment of a justice of the peace, in which case it is provided by an act of assembly, that the defendant shall not be liable to costs, where less is recovered by the plaintiff on the appeal than the amount of the judgment rendered by the justice, (unless the defendant produces new evidence.) It was decided, that neither a jury nor arbitrators can give costs, in the face of this act of assembly, where the damages found for the plaintiff are less than the sum recovered before the justice. The case of *Hinds v. Knox* has not been questioned, and we consider it as decisive of the point now before us. It is to be remarked, too, that the principle of that case appears to have been approved of by the legislature. For by the act of the 13th of *February*, 1816, 6 *Sm. L.* 323, it was enacted, that in all actions for the recovery of damages, for any trespass committed against real or personal estate before any justice of the peace or alderman, and referred agreeably to law, the referees should be empowered, in addition to their report of the damages, to decide and report whether the plaintiff or defendant should pay the costs of such action, or in what proportion they should be paid by the plaintiff or defendant respectively, &c.

It is the opinion of the court, that the judgment should be affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 12, 1826.]

THOMPSON *against* BRACKENRIDGE and others.

IN ERROR.

Sales of unseated lands for taxes, in the counties of *Beaver* and *Butler*, under the act of the 26th of *February*, 1817, are subject to the provisions of the act of the 13th of *March*, 1815: consequently, the omission of notice, required by the act of 1817, does not vitiate the sale.

THIS was an ejectment brought by *Samuel Thompson*, the plaintiff in error, against *Allen Brackenridge* and others, in the Court of Common Pleas of *Butler* county, to recover a tract of land, to which the plaintiff claimed title under a treasurer's sale for taxes.

(Thompson v. Brackenridge and others.)

After other testimony, the plaintiff offered in evidence the deed of the treasurer of *Butler* county to *John Brown* for the land in question, and the bond given by the purchaser for the surplus money. The defendant's counsel objected to the evidence, because the plaintiff had not proved the notice required by the special act of assembly, passed the 26th of *February*, 1817, authorizing the sale of unseated lands in *Butler* county for taxes, under which the sale in question was made. The court rejected the evidence, and an exception was taken to their opinion.

The plaintiff then offered in evidence certain newspapers printed in *Pittsburg* and *Philadelphia*, (there having been no newspaper printed in the county of *Butler* at the time prescribed by the act of assembly for the publication of notice,) in which notice of the treasurer's sale of lands in *Butler* county was published. This notice described the land in question as lying in *Slippery Creek*, instead of *Slippery Rock* township, there being no such township as *Slippery Creek* in the county. This evidence was objected to by the counsel for the defendant, and the court sustained the objection; upon which a bill of exceptions was tendered to their opinion.

Ayres and *Bankes*, for the plaintiff in error.

1. The treasurer's deed and the purchaser's surplus bond ought to have been admitted in evidence, without proof that notice had been given, agreeably to the provisions of the act of the 26th of *February*, 1817, under which the sale was made. The second section of that act, by enacting that the sales shall be in the manner, and under the regulations of the act of the 13th of *March*, 1815, introduces all the provisions of the act of 1815, which debars the owner of the land sold from taking advantage of the want of notice. The treasurer is liable to a penalty of fifty dollars, if he omits to give notice, but the omission does not vitiate the sale. This is a material regulation of the act of 1817, which, by general words used in the act of 1817, is incorporated into that act.

2. The reason for rejecting the newspapers was, that the land was described as lying in the wrong township. This was a mere typographical error, which should not have prevented the evidence from going to the jury. In other respects, it was accurately described as lying in the second Donation District, *Butler* county, No. 401. But if this irregularity was material, it is cured by the act of 1815, by the provisions of which, sales under the act of 1817 were regulated.

Breedin and *Baldwin*, for the defendants in error.

1. The act of 1817 was a special law, authorizing the treasurers of *Beaver* and *Butler* counties to sell lands for taxes at an unusual time. viz. in *August*, 1817. By this act, notice is expressly directed to be given, and justice required that it should be so. The act of 1815 dispensed with notice, because the time of sale was fixed by the law, and was uniform through the state. If, however,

(Thompson v. Brackenridge and others.)

notice is not given, the treasurer is liable to a penalty of fifty dollars, which is given to the owner of the land sold, to indemnify him for any injury he may have sustained from want of notice. In this respect it differs from the act of 1817, which inflicts no penalty on the treasurer for the omission of this important duty. The only safeguard of the owner, therefore, is to avoid the sale.

2. The error, in describing the township, was fatal. Where the title to land is to be divested, the provisions of the law must be strictly complied with. The legislature has directed the name of the township to be inserted in the notice, and therefore it must not be omitted.

The opinion of the court was delivered by

GIBSON, J. The doubt suggested, is, whether the sales in the counties of *Beaver* and *Butler*, by virtue of the act of 1817, are subject to the provisions of the act of 1815. A decision in the affirmative will conclude the former owner; for it is clear, and has been so held, that he shall be prohibited from availing himself of any defect in the evidence, except that which may be necessary to show that the land was unseated, that a tax was actually assessed, (however irregularly,) and unpaid at the time of the sale; and that there was not an offer to redeem within the two years.

Accident had prevented the commencement of sales in these counties, at the biennial period prescribed in the act of 1815, and the exigencies of the public required that sales should be made in the intermediate year; so that the only object of the legislature was to authorize the commissioners to sell a year sooner than they could otherwise have done. Why should it be thought they intended to deprive the purchaser of the benefit of the act of 1815? The argument is, that a special notice of the time of sale is not necessary under that act, because returning periods of sale are fixed at stated intervals, and owners are therefore apprised by the act itself, that their lands will be sold at the regular period, if the taxes are not paid; whereas notice of sales, at an intermediate and irregular period, would be absolutely necessary, and that this would be a consideration with the legislature to exempt those sales from the provisions of the former act. But would bidders be apprised of the recurrence of the regular periods of sale under the act of 1815; and would not owners suffer an injury from want of publication of notice, by a reduction in the price bidden for their lands? Beside, notice is peremptorily directed in all cases, and certainly for the benefit of the owner; so that the apparent hardship of prohibiting him from setting up the want of it, in respect of sales under either act, is the same in every thing but degree. The evil of the old system (and it was a sore one,) arose from the neglect of the commissioners, in omitting to perpetuate the proper evidence of the transaction, without which the purchaser was unable to make out his title, although every thing which the law re-

(Thompson v. Brackenridge and others.)

quired might, in fact, have been done; the courts proceeding, as they were bound to do, on the maxim *de non apparentibus*. It was to establish the converse of this, as applicable to sales for taxes, that the provisions peculiar to the act of 1815 were introduced. Then, in the absense of positive words, why should an intention to engraft the old mischief on any part of the new system, be imputed? Such an imputation would be in the face of the policy manifested by the legislature ever since. But the words of the act of 1817 can hardly be thought ambiguous. The sales were to be "conducted in the manner, and under all the regulations and restrictions" of the act of 1815. If this were restrained to the sale itself, every irregularity in the preparatory steps would be let in against the title, and all the evils of the old system revived, while the owner would be deprived of the right of redemption. But, properly speaking, a sale is subject to restriction where the owner is to be concluded, whether it be regular or not, the restriction being of a right which he would otherwise be at liberty to exercise; and thus even the letter of the act may be put out of the way of what was indubitably the actual intent of the legislature.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 12, 1826.]

TURK *against* M'COY and Wife.

IN ERROR.

The purchaser of unseated lands sold for taxes, is bound to pay only the amount of his bid, and not, in addition thereto, the prothonotary's fee for entering the acknowledgment of the deed. The taxes and costs, including the prothonotary's fee, are to be paid to the treasurer, and the surplus bond taken for the balance of the purchase money.

WRIT of error to the Court of Common Pleas of *Butler* county, in an ejectment brought by *Neil M'Coy* and *Mary* his wife, against *Ephraim Turk*.

The facts of the case will be found in the opinion delivered to the jury by the President of the Court of Common Pleas, which was returned with the record, unaccompanied by a bill of exceptions or any other statement of the evidence.

SHALER, President. The plaintiffs derive title as the heirs at law of *Thomas Tull*, the patentee of the tract of land in controversy. The defendant, who is proved to be in possession of the contested premises, claims to hold by virtue of what is usually called a commissioner's deed to *David M'Junkins*, dated the 13th of *August*, 1818, and transferred regularly to the defendant. This deed, notwithstanding numerous objections to its admission, which have been overruled by the court, to whose opinion various exceptions have

(Turk v. McCoy and Wife.)

been taken, has been admitted in evidence. *Prima facie*, it would furnish a complete defence to the plaintiffs' action, but it is contended by the plaintiffs' counsel, that it appears on the face of the deed that the purchaser, at the sales for taxes, bid an amount beyond what was necessary for the payment of the costs and taxes; and that for this surplus the treasurer omitted to take a bond, in conformity with the directions of the second section of the act of April, 1804, directing the mode of selling unseated land for taxes. The amount bid by the purchaser was fourteen dollars thirty-seven and a half cents. Of this, the road tax amounted to five dollars, the county tax to five dollars and fifty cents; and the balance, of three dollars eighty-seven and a half cents,—is charged as the amount of costs, which, by the third section of the mandatory act of March 13th, 1815, and the first section of the act of March 19th, 1817, the purchaser was bound to pay. If there was a surplus beyond the amount of taxes and costs, which the purchaser was bound to pay, he was bound to give the treasurer his bond for that surplus, however small; and, failing in so doing, he by such neglect makes void his title. This I take to be clear, and it is equally clear, that the treasurer cannot, by taxing such surplus in the costs of sale, whether by design or accident in receiving the same, preclude the original owner of an unseated tract from taking advantage of the defect.

The treasurer, in the instance before us, in order to bring up the costs to three dollars eighty-seven and a half cents, has, as is alleged, introduced two items which, it is contended, he has no right to charge. These are twenty-five cents for drawing a bond, when no bond was drawn; and one dollar to be paid to the prothonotary for entering the acknowledgment of the deed. This last item, it is contended, the purchaser is bound to pay, in addition to such part of the purchase money as is necessary to pay off the taxes and costs; and that this sum, instead of forming a part of the costs which the treasurer should have legally charged, was a surplus, for which a bond ought at the time to have been given. The impression which I have received from the argument, and from the examination I have been able to give the acts commented upon, is, that the one dollar to be paid by the purchaser for the use of the prothonotary, is exclusive of the amount of his bid; that the treasurer had no right to receive from the purchaser any greater amount of the purchase money than was necessary to pay the amount of taxes and the costs, exclusive of the sum which he was authorized to receive for the use of the prothonotary; that if he embraced in the costs to be paid out of the purchase money, the prothonotary's fee for entering the acknowledgment of the deed, he acted erroneously, inasmuch as such amount, so embraced, was a surplus for which he was bound to take a bond of the purchaser, and by such error the title of the purchaser is rendered null and void. It is for the jury to say, whether this item has been thus

(Turk v. M'Coy and Wife.)

erroneously taxed by the treasurer in the bill of costs; if so, a surplus existed for which he ought to have taken a bond. The deed of the defendant becomes a nullity, and the plaintiff is entitled to your verdict.

The errors assigned in this court were,—

1. The court erred in directing the jury, that the one dollar for the prothonotary was to be paid by the purchaser, over and above his bid, and that that dollar was a surplus, for which a surplus bond should have been given by the purchaser.

2. The court erred in stating to the jury, that the twenty-five cents allowed in the fee bill of 1814, for taking and filing a bond for the surplus, was in this case a surplus for which a bond ought to have been taken by the treasurer.

3. In leaving it to the jury to say whether the costs were erroneously taxed or not.

Ayres, for the plaintiff in error, referred to the *Act of the 13th of March, 1817, sect. 1, Purd. Dig. 790. Act of the 28th of March, 1814, Purd. Dig. 283. Act of the 13th of March, 1815, Purd. Dig. 787. Riddle v. Bedford County, 7 Serg. & Rawle, 390. Act of the 22d of February, 1821, Purd. Dig. 286.*

Breedin and Baldwin, for the defendants in error, cited *Sutton v. Nelson, 10 Serg. & Rawle, 238.*

The opinion of the court was delivered by

ROGERS, J. This case depends on the construction of the third section of the act of the 13th of *March, 1815.* directing the mode of selling unseated lands for taxes. The plaintiff in error, *Ephraim Turk*, holds by virtue of a deed from the treasurer of *Butler* county, the land in dispute having been sold for the payment of taxes regularly assessed. The property was sold for fourteen dollars thirty-seven and a half cents; the whole amount of which was paid by the purchaser to the county treasurer. It is alleged by the defendant in error, (the plaintiff in the Common Pleas,) that there is a surplus after payment of the taxes and costs, and that the purchaser has omitted to give, and the treasurer to receive, a surplus bond, in compliance with the provisions of the second section of the act of the 3d of *April, 1804.* It appears, that after the payment of the road and county taxes, there remained of the purchase money three dollars eighty-seven and a half cents. The treasurer, in order that the costs should amount to this sum, has introduced two items,—twenty-five cents for drawing the bond, which never was drawn, and one dollar to the prothonotary, for entering the acknowledgment of the deed. It is contended, that the one dollar is to be paid by the purchaser, in addition to the purchase money; whilst, on the other side, it is insisted that it is to be paid to the treasurer, out of the purchase money of the land. If the defendant in error be correct, there is a surplus for which a surplus

(Turk v. McCoy and Wife.)

bond should have been executed, on the authority of the case of *Sutton v. Nelson*, 10 *Serg. & Rawle*, 238.

The strong inclination of my mind is to support, by every reasonable intendment, the title of purchasers of real estate, sold for the payment of taxes, more particularly since the passage of the act of the 13th of *March*, 1815. The legislature have clearly manifested this intention, and courts of justice are bound to carry that intention into effect. The prompt payment of taxes enters intimately into the fiscal concerns of every country, and public policy requires that courts of justice should facilitate, rather than obstruct, the collection of their county rates and levies. The general opinion that prevails, that no sales of land for the payment of taxes can be supported, has, I fear, caused great delay and negligence in the payment of taxes, by resident, as well as non-resident land owners. A similar idea has been the cause of the sale of lands for a mere nothing in comparison with their value. The act of 1815 is by no means illiberal in its provisions. The owners are necessarily aware of the nonpayment of their taxes, that the act fixes a particular day for the sale of the land, and, moreover, that they have two years to redeem their land. If, then, they are unable to show payment of their tax, or that they have redeemed their land within two years, what right have they to expect favour in a court of justice? Why should the *bona fide* purchaser be deprived of his land, upon a mere technical objection, or on non-compliance, on the part of the commissioners, with some of the formalities of the act, or a mistake of the treasurer in the amount of costs. Where it clearly appears that there is a surplus, or that there is a collusion between the treasurer and the purchaser to swell the costs, so as to absorb the purchase money, then the owner should avoid the sale; but where it is a mistake of the treasurer in the amount of costs, the purchaser ought not to be affected. It should be left, as a matter between the treasurer and the owner, with which the purchaser has no concern. In this case, the purchaser, with good faith, paid to the treasurer the whole amount of purchase money, and I can perceive no principle of reason or law, which would justify this court in depriving him of his land. Let us, however, recur to the construction of the second section of the act of 1815. If there be a mistake of construction, it would seem to be a common mistake, and indeed it must be confessed that the act is rather obscure in its terms. If necessary, I would here apply the maxim, *communis error facit jus*. The principle involved in this case, came incidentally before the court in *Riddle v. The County of Bedford*, 7 *Serg. & Rawle*, 390. Justice DUNCAN, in delivering the opinion of the court, says, "All that the purchaser is bound to pay, is the amount of his bid. The taxes and costs, including the prothonotary's fee, he is to pay down, and the balance to give his bond for." Although not the point

(Turk v. McCoy and Wife.)

in the cause, it is something more than a mere *dictum*. The act of 1815 appears to have been well considered, and the principle forms one of the most prominent arguments in the decision of the turning point of the cause. The legislature say, in the second section, "that the purchaser shall pay to the treasurer the amount of the purchase money, or such part thereof as shall be necessary to pay off the taxes and costs, and also to pay, in addition, the sum of one dollar for the use of the prothonotary, for entering the acknowledgment of the deed." It may be remarked, that the one dollar is to be paid to the treasurer for the use of the prothonotary, and not to the prothonotary himself. It is to be paid in addition. In addition to what? To the purchase money? I do not so understand the act,—but in addition to the taxes and costs which he is directed to pay to the treasurer. This construction is strengthened in the third section. The owner can redeem his land by an offer, or legal tender to the treasurer, of the amount of taxes for which the lands were sold, and the costs, together with the additional sum of twenty-five *per cent.* on the same. If, then, the one dollar does not form part of the purchase money or costs, the purchaser, on the redemption of the land, must lose it, as the owner clearly is not bound to pay more than the purchase money and costs, with the *per centage*. This surely was not the intention of the legislature. As the owner was in default, they intended he should pay the purchase money, and all the costs and charges, which resulted from the sale, and, moreover, mulcted him in the additional sum of twenty-five *per cent.* on the whole amount. On the authority, then, of *Riddle v. The County of Bedford*, 7 Serg. & Rawle, 390, and on consideration of the act of the 13th of March, 1815, I am of opinion, that all the purchaser is bound to pay is the amount of his bond: That the taxes and costs, including the prothonotary's fee, are to be paid to the treasurer, and that the remainder of the purchase money only, forms part of the surplus bond.

I say nothing of the second and third errors assigned, as they have, upon an intimation from the court, been properly abandoned.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 12, 1826.]

CLARKE and another *against* VANKIRK.

IN ERROR.

In ejectment, the defendant may give in evidence the declarations and acts of the plaintiff, tending to prove that he had made a parol sale of his interest in the land in dispute, accompanied by payment of the purchase money and delivery of the possession.

THE record of this case having been returned on a writ of error to the Court of Common Pleas of *Allegheny* county, accompanied by three bills of exceptions to the rejection of evidence offered by the defendants below, the plaintiffs in error, it appeared that the action in the court below was an ejectment, brought by *John Vankirk* against *Thomas Clarke* and *Robert Graham*, to recover half of a tract of land in *Elizabeth* township, containing one hundred and thirty-two acres, or thereabouts.

The plaintiff gave in evidence an article of agreement, dated the 25th of *October*, 1811, by which the executors of *William Sampson*, contracted to sell the land in question to *William Vankirk* and *John Vankirk* for eleven hundred dollars,—two hundred dollars payable in *April*, 1812, and the remainder in yearly instalments of one hundred and fifty dollars each. And he proved the payment of the instalments in 1812, 1813, 1814, and 1815, by *John* and *William Vankirk*, jointly.

The defendants, who claimed as purchasers of the land at sheriff's sale, as the property of *William Vankirk*, on the 4th of *August*, 1821, admitted themselves to be in possession, but alleged that *John* had parted with his interest in the land in question, to *William* in the year 1816; that he had then removed from the premises, and delivered the entire possession of them to *William*, who had paid him for his interest in them. This matter formed the subject of three bills of exceptions:—one to the rejection of the deposition of *Joseph Vankirk*; the second to the rejection of the testimony of *Fauntly Muse*; and the third, which embraced the first two, to the rejection of evidence generally, offered by the defendants to prove a parol sale by *John* to *William Vankirk*. The offer of evidence by the defendants was in these words:—"The defendants offer to prove, that, in the year 1816, *John Vankirk*, the plaintiff, left the land in question with his family, and did not return to it until 1822, during which time *William Vankirk* occupied the same, and held the sole and exclusive possession thereof: That about the time of *John* leaving it, in 1816, he stated to a number of persons now attending as witnesses, that he had sold his share of the said land to his brother *William*: That he shortly after became possessed of *William's* share (the one half,) of a keel boat, which he said he had received

(Clarke and another v. Vankirk.)

from *William* in part payment of the land: That from 1816, until a considerable time after the sale of the land at the suit of the commissioners, in *August*, 1822, *John* repeatedly declared, that he had sold his share of the land to his brother *William*, and that all, or nearly all, the consideration money had been paid: That during all the time *William* claimed the land as his own, and paid from time to time to the executors of *Sampson*, the residue of the purchase money due to them, on the said articles of agreement, and that after 1816, *John* neither paid nor offered to pay any more to the said executors." The offer contained other matters, relating, among other things, to *John's* conduct at the time the land was offered for sale, which were admitted by the court.

Pentland and *Forward*, for the plaintiffs in error, cited, *Jones v. Peterman*, 1 *Serg. & Rawle*, 544.

Fetterman and *Biddle*, contra, cited, *Richardson's Lessee v. Campbell*, 1 *Dall.* 10. *Jackson v. Vosburg*, 7 *Johns.* 186. *Jackson's Lessee v. Casey*, 16 *Johns.* 302. 2 *Eq. Ab.* 46. 4 *Dall.* 152. *Phillips v. Thompson*, 1 *Johns. Ch. R.* 149. *Syler v. Eckhart*, 1 *Binn.* 380. *Bassler v. Niesly*, 2 *Serg. & Rawle*, 357.

The opinion of the court was delivered by

HUSTON, J. Few legislative enactments have been the subject of more discussion in courts of justice, than the statute to prevent frauds and perjuries; the literal construction of which would avoid all agreements respecting lands, for any title which is to last longer than three years. A construction was, however, early adopted, and has been uniformly sanctioned by all courts since the date of the law, which I believe to be the *true construction*, and which I suppose no court in this state is now at liberty to depart from, because, in many cases, any other construction would work the grossest injustice; because solemn decisions, made repeatedly and during a long period, become rules of property, and ought for the sake of certainty to be adhered to, as if they had been originally part of the text of the statute. And because, in this state, our legislature have very directly sanctioned the construction given by the court, on the act in question, and have extended the effects of that construction in a very important particular, and in very plain language, by the act of the 19th of *March*, 1818, *Purd. Dig.* 125. This act empowers the court, in a summary way, to enable executors or administrators to carry into effect *parol* contracts for the conveyance of land, where such contracts shall, in the opinion of the court, have been so far in part executed *as to render it unjust to rescind the same*. And, in another part of the act, it directs the court to proceed on the petition, if it shall be of opinion that the case therein disclosed doth not come within the meaning of the act for the prevention of frauds and perjuries, &c. In this state, then, an uniform series of decisions, sanctioned by such a legislative recognition, has perhaps put it beyond the power of a court,

(Clarke and another v. Vankirk.)

which should be disposed so to do, to return to the strict letter of the act. There will arise cases, in which a court may doubt whether the land should be held or not; but, in such cases, *all* the evidence must be heard and carefully weighed. Whether delivery of possession alone, or payment of money alone will take a case out of the statute, is a question which it is not necessary to decide in this cause, for the defendants offered to prove both. I will only say, that if on a parol sale possession is delivered of property of little value, and that possession is held for a long time, until by gradual improvement and much labour it is rendered valuable, it is possible it might, and that it ought to be considered a valid transfer, on the consideration being paid, even at a distant period. It is also possible, that payment of money alone, without taking possession, may make a strong case, as, where unseated lands are agreed to be sold, and the purchaser proceeds for years, paying annually the instalments, paying taxes, &c. I give no positive opinion on these points. What is just, where it would be unjust to rescind the contract, must depend on what is proved in each case.

In this case, the court is of opinion the evidence ought to have gone to the jury: if *proved as stated*, it would have made a very strong case. In the argument, much was said of the danger of relying on confessions or declarations of the party, to prove a parol sale. A single declaration to a single person is not the most satisfactory evidence in all cases; but still it is *evidence*, and must be heard. Repeated declarations to the same effect, made at different times to different persons, during a long period, are among the most satisfactory of proofs. How far the witnesses will support the whole of the points, or how far they will be believed by the jury, are other matters. *If all is proved, and all believed*, the plaintiff has no right, or only a right to what balance may clearly appear to be due him from *William*. And if the testimony contained in the other part of the defendants' offer, *satisfies the jury that John was present at different times when the sheriff offered the property for sale*, and never hinted at any claim of his own until after the deed was made, and money paid, he has no colour of right to any thing.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 19, 1826.]

STEINMAN *against* SAUNDERSON, Administrator of
STEINMAN.

IN ERROR.

An administrator cannot maintain an action against his co-administratrix, (who was the widow of the intestate,) for money received by her beyond her share in her husband's estate, before a final settlement of the administration account, and while a balance remains in his hands due to the estate.

It seems, that after a final settlement of the administration account, and payment of the balance to those who are entitled to receive it, such an action may be maintained.

ON the return of the record of this case from the Court of Common Pleas of *Indiana* county, several errors were assigned, which were argued by *White* for the plaintiff in error, who cited *Shelby v. Daly*, 2 *Serg. & Rawle*, 548.

The court declined hearing *Stewart* for the defendant in error.

The opinion of the court, which contains every thing material to the point decided, was delivered by

TILGHMAN, C. J. This was an action on the case, brought by *Jacob Steinman*, the plaintiff in error, against *Thomas Saunderson*, administrator of *Sarah Steinman*, deceased. Several bills of exception to evidence, offered by the plaintiff and rejected by the Court of Common Pleas, were taken on the trial of the cause, but the whole turns on one principle. *Jacob Steinman*, the plaintiff, and *Sarah Steinman*, the defendant's intestate, were co-administrators of *Christian Steinman*, deceased, the husband of the said *Sarah*. The plaintiff principally transacted the business of the estate, and charged himself with the whole amount of the inventory. He settled two accounts of his administration, which were passed by the Register of Wills and the Orphans' Court. In the first of these accounts, there was a balance of one hundred and fifty-five dollars and forty-three cents, due from the administrator to the estate; and, in the second, the balance against him was four hundred and eighty-four dollars and forty-eight cents, *which still remains unpaid*. *Sarah Steinman* received part of the goods of her intestate, (included in the inventory, and with which the plaintiff had charged himself,) intending to take them on account of her third of her husband's estate; and she afterwards received some money arising from debts due to her husband's estate. There is little doubt, that, upon a settlement between her and the plaintiff, she will fall in his debt, having, in all probability, received more than the third of the estate to which she was entitled as the widow of *Christian Steinman*. But the question is, whether, under existing circumstances, the plaintiff can recover in this suit, and I think he cannot. The declaration contains counts for goods

(*Steinman v. Saunderson, Administrator of Steinman.*)

sold and delivered, and money paid and advanced by the plaintiff for *Sarah Steinman*, and money received by her for his use. There is no pretence for saying, that there were any goods sold by the plaintiff to *Sarah Steinman*, or money paid or advanced on her account. Nor do I perceive, that she can be said to have received money for his use. The administration account is not yet finally settled,—a large balance remains in the hands of the plaintiff, and if he were permitted to recover against the defendant, the estate of *Sarah Steinman* might be chargeable by a suit on the administration bond, with the balance due from the plaintiff to the creditors, if any there be, or to the next of kin of *Christian Steinman*. If we had a Court of Chancery, that would be the tribunal for settling the account between the administrators themselves. And, as we have no chancery, I see no reason why the plaintiff, if he had settled the estate of *Christian Steinman*, and paid the balance due from him to the persons entitled to receive it, might not support an action against the estate of his co-administratrix, for the amount received by her beyond her share of her husband's estate. In the mean time, her administrator might be compelled to a settlement of her administration account, on the estate of her husband, by a suit on her administration bond; and it would then appear, whether she had applied any part of the assets received by her to the payment of her husband's debts; and thus the account between her and the plaintiff might be easily adjusted. But, as matters stand, a decisive argument against the plaintiff is, that he has no right to demand from the defendant money which was assets in the hands of *Sarah Steinman*, while *Christian Steinman's* estate remains unsettled, and the plaintiff himself is considerably indebted to it. I am therefore of opinion, that the judgment for the defendant in the Court of Common Pleas should be affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 26, 1826.]

M'ALMONT *against* M'CLELLAND.

IN ERROR.

Where, in slander, the words laid are, that the defendant said that the plaintiff had *stolen* property; and the witnesses offered by the plaintiff, can only testify, that the defendant said that the plaintiff had either *taken* or *stolen* it, without being able to say which expression was used, the court ought to receive the evidence, and leave it to the jury to determine, from the sense of the whole conversation, which expression was used.

A repetition of the charge, after suit brought, may be given in evidence, to show malice, in an action of slander.

In slander, evidence is admissible to prove the defendant's situation in point of property.

ON a writ of error to the Common Pleas of *Washington* county, it appeared by the record, that *Robert M'Clelland*, the defendant in error, brought this action against *John M'Almont*, the plaintiff in error, for defamatory words. The declaration contained two counts, in the first of which, the words were laid thus: "You are a thief, and I can prove it; you stole hides or leather out of your father's tan vats in the night-time." In the second count, the same words were laid in the third person.

At the trial, the plaintiff offered *Isaac Griffith* and *Richard Chapman*, to prove the facts hereafter stated. Their evidence was objected to by the defendant's counsel, but the court admitted it, and exception was taken to their opinion. *William Rankin* testified, that in the month of *October*, 1823, after the election, he was at *James Harwood's*, at a husking, in company with the defendant and several others: That whilst at supper, the defendant asserted that the plaintiff, after his removal to *Burgettstown*, came to his father's in the night, and *took* or *stole*, (the witness could not say which was the expression,) a quantity of leather from his father's vats: That the plaintiff took out the leather, and filled up the vats with tan bark: That the defendant asserted "he could prove this," or that "it could be proved," the witness could not say which expression was used, but he was confident it was one or the other.

Isaac Griffith swore that he was at *Harwood's*, on the occasion referred to by *Rankin*: That they were talking about the election, when it was asked, what *Robert M'Clelland* (who was stated in the declaration, to have been a candidate for the office of sheriff,) could do with a certain *M'Conehough*, who had made charges against him: That the defendant said he could do nothing with him; for that he, the plaintiff, had either *taken* or *stolen*, (the witness, could not specify which of the expressions was used,) leather out of his father's tan vats: That the witness observed, he did not count it stealing, as it was from the premises

(M^cAlmont v. M^cClelland.)

of M^cClelland's father; but M^cAlmont, (the defendant,) said it made no difference, though the father did not prosecute: That some time after, M^cAlmont was at the witness's house, with M^cClelland: That he did not deny what the witness had reported him to have said at Harwood's, except the circumstances of M^cClelland's going by night for the leather. Richard Chapman proved, that after the institution of this suit, he heard the defendant say, that he could have no difficulty in proving that the plaintiff had stolen his father's property.

The plaintiff offered to prove, by James Ross and others, the situation of the defendant in point of property; to which the defendant's counsel objected, but the court overruled the objection, and the evidence was given; upon which a bill of exceptions was tendered to the opinion of the court.

Wagh and Biddle, for the plaintiff in error,

1. The words proved by Rankin and Griffith, did not go to support the declaration. The declaration charges the defendant with having said, that the plaintiff *stole* the leather, and the witnesses were unable to say, whether he said that he had *taken* or *stolen* it. Words must be proved as laid, and words to *the same effect*, will not do. 2 *Phill. Ev.* 97. Words laid in the third person are not supported by evidence of words spoken in the second person. *M^cConnell v. M^cCoy*, 7 *Serg. & Rawle*, 227. *Brown v. Lamberton*, 2 *Binn.* 34. 3 *Binn.* 515.

2. The evidence of Chapman went to prove words spoken since the commencement of the suit, which was incompetent, if the words laid in the declaration were not proved. In *Wallis v. Mease*, 3 *Binn.* 550, the Chief Justice declared, that if it had not been already determined, that words spoken since those laid in the declaration were evidence, he should reject them.

3. The admission of evidence of the defendant's situation, as respects property, was wrong. The plaintiff's rank in life, may be given in evidence, because it is in issue. *Learned v. Buffington*, 3 *Mass. Rep.* 552. But the condition of the defendant is a different matter. The injury to the plaintiff is no greater on account of the defendant's estate; and, as the defendant has no notice of the evidence, he may be much surprised by it. There is no adjudged case or authority on the point; but the reasoning of *Starkie*, (1 *Starkie on Slander*, 402,) seems in our favour.

Kennedy, for the defendant in error. It is enough if the witness proves the substance of the words laid in the declaration; words, which in common parlance have the same import. *Miller v. Miller*, 8 *Johns.* 74. The declaration may lay, that the defendant "spoke words *in substance as follows*." *Kennedy v. Lowry*, 1 *Binn.* 393. The objection that the witness was not sure whether the word *took* or *stole* was used, may be answered by saying, that this was a question proper for the determination of the jury upon a view of the whole evidence.

(M'Almont v. McClelland.)

The opinion of the court was delivered by

DUNCAN, J. This was an action, brought by *McClelland*, against *M'Almont*, for defamatory words laid in two counts. In the first, "You are a thief, and I can prove it. You stole hides or leather out of your father's vats in the night time." In the second count the words are laid in the third person.

The errors assigned were in receiving the evidence of *William Rankin* and *Isaac Griffith*. They are precisely of the same character, and are said to consist in this,—that these witnesses could not state the very words of the defendant, whether it was *stole* or *took*; and though they were sure it was either the one or the other, they could not state which. Admitting this to be the subject of a bill of exceptions to the evidence itself, (for the sake of the argument,) and for any other purpose I protest against it, because, if there is any thing in the exception, the course should have been, after the evidence had been received, to call on the court to instruct the jury, that the defendant had not proved the words laid, and then, if the opinion had been erroneous, to except to that, I am of opinion that it was admissible, and that it was for the jury to say what the words really were, from the sense of the whole conversation. For, if that were not the case, the slander must have gone unpunished. The defendant explained what he had said, and intended, in the subsequent part of the same conversation; a construction of it. On the charge being made, the witness, *Rankin*, observed, "He did not count the act *stealing*, as it was from the premises of his father." To which *M'Almont* directly replied, "That made no difference, though the father did not prosecute:" thus directly impeaching him of the act of stealing. "It is stealing," said the defendant, "though on his father's premises; and though his father has not prosecuted him." This was not only the plain meaning, but the plain language; and so the jury have found the fact, that the defendant did say *stole*, and, I think, with good reason. On a motion for a new trial, the court would not have set aside the verdict as contrary to the evidence; and the evidence of *Richard Chapman* confirms this, if it wanted confirmation. For after this suit had been instituted, he said he would have no difficulty in proving that the plaintiff, *McClelland*, had stolen his father's property. Nothing could tend more to satisfy a jury that the word was *stole*, than the defendant's boast that it would be easy for him to prove it. But this evidence was likewise excepted to. This was not a new charge, for which a new action could be brought, but was spoken in relation to the pending suit; in defending himself from which suit, he said he would have no difficulty in proving that *McClelland* had done that which he had charged him with,—to wit, stolen his father's property. It was a repetition of the same charge, and was evidence of his malice; and it was proving, from his own lips, that stealing was the crime imputed to the plaintiff by him. This was all proper evi-

(McAlmont v. McClelland.)

dence to go to the jury, and if the court had overruled it, it would have been withdrawing the facts on trial from the jury. If the defendant had demurred to this evidence, its truth would have been admitted, and every inference which a jury might reasonably have drawn from it, must have been likewise admitted. The jury might have reasonably drawn the inference, that the word was *stole*. Indeed, from the whole conversation, (its whole colour,) stealing was the very thing he intended; and his subsequent boasting shows it was the word he had used. There is no error, therefore, in the first bill, which relates to these three witnesses.

The second bill of exception, was to the admission of evidence to prove the defendant's situation in point of property. It has not been denied, that it has been the practice to receive this kind of evidence in actions of slander, though it is said, that there is no adjudication to be found in the books of reports, where there has been a direct decision on a question made. It is enough to say, that this practice has continued for a time, beyond which the memory of man runs not to the contrary. This constant usage proves the law. We look for cases on disputed points, but undisputed principles may be, without any particular precedent to be found, or a direct judicial decision. It is handed down as the law,—the principle has been constantly applied. What is this but the common law? No man can tell me when, or name the case in which it was first decided, that the word *heirs*, in a deed, was necessary to create a fee simple estate. This inquiry into the condition of the defendant has constantly been made, and has always been applied to those cases where damages are designed, not only as a satisfaction for the injury, but as a terror to others, and as a proof of the detestation of juries. In cases of crim. con., actions for debauching a man's daughter, seduction and getting with child, *per quod servitium amisit*, actions for malicious prosecution, slander, and other actions of the same species, where the damages are not matters of calculation by dollars and cents, but where each must depend on its own particular circumstances of aggravation, and the condition in life of the parties, courts (unless the damages are outrageous,) never set aside the verdict on account of the damages, but always take into view the situation of the parties as to property; and this they can only know from the evidence. The condition, and even the sex of the parties, are considered. The imputation of want of chastity to a man, is actionable; yet, unless under very particular circumstances, only nominal damages would be given. The pecuniary injury might be as great to him, as the same imputation would be to a female. In the latter case, they would always bear some proportion to the estate of the slanderer, and the condition in life of the party slandered. Pecuniary loss is lost sight of,—it is not a matter of calculation, but of policy: the estimation of the value of character, and the detestation of crime.

The counsel has selected one of our wealthiest citizens to illus-

(M'Almont v. M'Clelland.)

trate his position, that the damages should be equal where a blow was inflicted by him on a man of his own standing in society, and where on the man who blacks his shoes; and that there should be the same measure of damages, where a slander was uttered by the shoe-black against a fish-woman, as by the wealthiest citizen against the most respectable female. In a remarkable case of malicious prosecution, where forty thousand pounds were given in damages, evidence had been given of the great estate of the defendant, in possession on record, of more than fifty judgments, to the amount of more than one hundred thousand pounds, and in the actual receipt of three thousand pounds *per annum*. The court refused a new trial, because the defendant was well able to sustain the verdict. In all trials for crim. con., the situation and condition of the parties are always given in evidence. With us these actions are uncommon, because the crime is a rare one.

The matter cannot be reasoned on, upon the doctrine of equality of rank and condition: the law does not so reason upon it. It would be destructive of the best interests of society so to reason upon it. The plaintiff, in this action, may give evidence of his own condition in life to aggravate the damages. This is well settled, and its reasons ably stated, in the opinion of one of the most distinguished judges, that ever graced a judicial seat in any county, Chief Justice PARSONS, in *Learned v. Buffington*, 3 *Mass. Rep.* 548. The same reason holds, and the same principle obtains, as to the condition and circumstances of the defendant. There is nothing in opposition to this to be found in any elementary treatise, and we are not to be guided in our judgments by the speculations of any writer, however respectable he may be, and however correct and well arranged his books may be, as a mere compilation. The passage referred to in *Starkie* is itself obscure. While he admits the practice, he says, "the principle is not very obvious, and scarcely can be warranted, unless the situation and rank of the defendant have affected the question of prejudice sustained by the plaintiff." This prejudice, in almost every case, will depend on the condition in society of the slanderer. But actual pecuniary prejudice seldom is susceptible of proof in these actions, and is not the only standard of damages. Pecuniary loss is often small, where the distress and misery inflicted by the slanderer are great. The injury is not capable of strict pecuniary admeasurement in fact; and wherever the natural consequence of the words is a damage, as the imputation of a crime of moral turpitude, subjecting the party to an indictment, or to an infamous punishment, always is, the law supposes a damage, whereas, in other cases, the party who brings an action for words must show the damage he has received from some specific loss. Damages are given by way of example. That which would be exemplary, as to one, would not make another feel,—would be no terror to him.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 26, 1826.]

ROSS and others against M'JUNKIN and others.

IN ERROR.

Although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law, which, as soon as the debts are satisfied entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name; and, in the absence of proof to the contrary, this court will intend that he produced satisfactory evidence, that the debts were paid; particularly, after a lapse of fourteen years.

Where two warrants to different persons are surveyad together, and a general diagram of surveys returned, without a division line, or any thing to designate each tract, the grantees are not tenants in common of the whole. Their rights, as between themselves, are suspended, until the subject of the grant to each shall be specifically designated by the proper officer, or by themselves; and, when that is done, the title of each relates to the commencement of the grant, and each may recover for himself.

THIS was a writ of error to the Court of Common Pleas of *Allegheny*, in an ejectment brought by the defendants in error, *William M'Junkin* and others, against the plaintiffs in error, *Samuel Ross* and others, for four hundred acres of land in *Plumb* township, bounded by lands of *John Brown* on the south, the heirs of *Hugh Davison* on the east, *Michael Coon* and others on the north, and land in the possession of *James O'Hara* on the west.

The facts of the case, so far as they could be collected from the record, were these:—

On the second of *December*, 1772, a warrant issued to *John Menough* for three hundred acres of land on the head of *Plumb* creek, including an improvement made by *William Menough* in the county of *Bedford*. On the 26th of *May*, 1773, a warrant issued in the name of *William Menough*, for two hundred acres of land on the head waters of *Turtle* creek, joining a tract of land of *John Menough*, including an improvement in *Westmoreland* county. On the 1st of *March* and 15th of *June*, 1773, a survey was made on both warrants by *Robert M'Crea*, in one undivided tract of five hundred and ninety-nine acres, one hundred and forty-five perches, which was returned into the surveyor general's office on the 26th of *January*, 1774. It was proved, by the deposition of *Robert Johnson*, that he helped *William Menough* to make the improvement, and that both the brothers told him, that *William* was to find the land, and *John* to pay the purchase money, and that the land was to be equally divided between them. On the 23d of *August*, 1783, *John Menough* made his will, which was proved in *Baltimore*, *September* 27th, 1783. He devised to *George Henry Blackheath* "two hundred acres of land, for which he had a warrant, expressing three hundred acres on the waters of *Plumb* run, in *Westmoreland* county, *Pennsylvania*." The re-

(Ross and others v. M'Junkin and others.)

sidue of his estate, real and personal, including one hundred acres of the above-mentioned tract, he gave to his brother, *William Menough*. On the 28th of *November*, 1801, *George Henry Blackheath* made a conditional sale of the land mentioned in the will to *Samuel Ross*. In *November*, 1794, *John Menough's* land in *Plumb* township was sold for taxes, and a deed made to *William M'Junkin*, who took possession of the south tract in 1796, and made improvements. On the 24th of *July*, 1795, *William Menough* made his will, by which he devised his plantation in *Plumb* township, *Allegheny* county, warranted in the name of *William Menough*, to his wife during her life, for herself and her three daughters, *Mary*, *Martha*, and *Elizabeth*, and after the death of his wife to the daughters in fee. *Elizabeth* died, and *Mary* and *Martha* married *M'Junkin* and *Davison*, the plaintiffs. In 1798 the widow married *Samuel Ross*, and afterwards died before the institution of this suit. On the 9th of *April*, 1808, *Samuel*, *William*, and *John Menough*, sons of the testator, by deed conveyed to *Samuel Ross* their interest in the one hundred acres devised to their father by *John Menough*, their uncle.

It further appeared, that on the 22d of *August*, 1782, *John Menough* conveyed to *Philip Ryan*, who, on the 8th of *January*, 1800, conveyed to *John Brown* the warrant of *John Menough*, reciting the deed of *Menough* to him of the 22d of *August*, 1782. On the 20th of *January*, 1800, *John Brown* took the benefit of the insolvent laws, and assigned all his estate, including the land in dispute in this suit, to *David M'Murtrie* and *Matthew Simpson*, and at *January* Term, 1803, the court of *Huntingdon* county appointed *James Hunter* and *Samuel Marshall* trustees, in the room of those who were first appointed. To *March* Term, 1801, *John Brown* brought an ejectment in *Allegheny* county, against *M'Junkin* and others, for the lands claimed under *John Menough's* warrant. This action was discontinued at *March* Term, 1803. On the 5th of *April*, 1809, *John Brown* entered a caveat against the warrants of *William* and *John Menough*, alleging that he had a title to both; and, on the 6th of *October*, of the same year, he presented a petition to the board of property, asking a re-survey, according to the description and proportion, and separate returns on each warrant. On the 2d of *January*, 1810, the board of property decided that both warrants should have an equal quantity, and that the county surveyor should make and return a new survey. This survey was never made. The surveyor proved, that if the order had been executed, it would have thrown *William Menough's* warrant upon the waters of *Turtle* creek, and *John Menough's*, where *Samuel Ross* resides. To *November* Term, 1814, an ejectment was brought by *John Brown* against two persons, named *Metzgar* and *Porter*, for four hundred acres of land in *Plumb* township, adjoining lands of *William Martin*, *Hugh Davis*, and *Thomas M'Elroy*. The cause

(Ross and others v. M^cJunkin and others.)

was tried on the 30th of *October*, 1821, when a verdict was given for the plaintiff. A motion for a new trial was afterwards made, which was overruled, and judgment entered on the verdict. Upon this judgment a writ of error was issued, returnable to *September* Term, 1823, and the Supreme Court affirmed the judgment.

At the conclusion of the trial, the following propositions were submitted for the opinion of the Court of Common Pleas:—

“1. Could *John Brown*, after his discharge under the insolvent debtors’ act, in *January*, 1800, maintain an ejectment in his own name for any of the lands mentioned in his schedule?

“2. Could *John Brown*, if capable of sustaining a suit for the lands he assigned under the act of insolvency, recover and take possession of any thing but that covered by the order of the board of property, in their final decree of the 2d of *January*, 1810?

“3. Could he recover any greater quantity than the half of the two surveys, laid out as specified in the last order of the board of property?

“4. Can the present plaintiffs recover before there is an actual eviction of their possession, and adverse possession taken, and metes and bounds settled and made known?

“5. If they can recover, can it be in any other manner than that directed by the board of property in 1810?”

The President of the court delivered to the jury the following charge, the whole of which it is necessary to insert, to enable the reader to understand the case.

“This case, as it respects many matters involved in it, is very obscure and difficult. I will not pretend to say, that I understand it perfectly, in all its ramifications. One thing, however, I see plainly, and no doubt you will also. The heirs of *William Menough* are entitled to land somewhere. With this view, it is our business to inquire whether the plaintiffs, who represent *William Menough*, have sustained their right to the land in possession of the present defendant. If they have not, they must fail and look somewhere else. It appears that *John Menough* obtained a warrant dated the 2d of *December*, 1772, and a warrant also issued to *William Menough*, dated the 26th of *May*, 1773. Upon these warrants a general diagram of surveys was returned, by which it appears that they were made on the 1st of *March*, 1773, and the 15th of *June*, 1773, and contained five hundred and ninety-four acres and one hundred and forty-five perches, with allowance. There is little doubt, perhaps, that *John Menough’s* warrant was first laid, because the survey of the 1st of *March*, 1773, was made before the other warrant was issued. The precise locality of it, in relation to the other tract, is not designated by the return. This has led to all the difficulty. The whole quantity was held in undivided possession by the two brothers, until the 26th of *August*, 1782, when *John Menough* conveyed by deed to *Philip Ryan*. The defendants’ counsel has adverted to sundry

(Ross and others v. M^cJunkin and others.)

suspicious circumstances connected with this deed, and appearing on the face of it, as he says. It has, however, not been very seriously impugned. A paper so old must necessarily, if not well kept, bear some of the obliterating marks of time. On the 8th of *January*, 1800, *Philip Ryan* conveyed to *John Brown*. At this period then how stood the rights of the parties? *William Menough* had made his will in *July*, 1795, devising this tract of land to his wife during her life, for herself and three daughters, *Mary*, *Martha*, and *Elizabeth*; and, after the death of the wife, to the daughters in fee. He died prior to *October 10th*, 1795, and subsequently his widow intermarried with *Samuel Ross*, the defendant. *Elizabeth* died, and *Mary* and *Martha* are married to *Davison* and *M^cJunkin*, the plaintiffs. *John Brown*, then, if the deeds were fair and valid, had lawfully acquired the right of *John Menough*, and *Ross*, (during the lifetime of his wife,) and *M^cJunkin* and *Davison*, by marriage with *Mary* and *Martha Menough*, were entitled to the remainder of the tract in right of their father, *William Menough*. But where were the several claims to be located? If there is any evidence to satisfy you of the separate locality of their tracts, you will fix them accordingly. An old diagram has been shown, found in the office of the deputy surveyor, on which the name of *John Menough* is marked on the south side of the survey. How it came there, and when, does not very certainly appear. It is also said, that a division was made between the two brothers. The evidence, if any, on this point is more by inference and argument than by direct proof. But if, from the testimony, you are satisfied that there was such a division, and that the defendants are in possession of that part which fell to the share of *William Menough*, there is an end of the controversy, and the plaintiffs ought to recover. It seems, however, that in 1809, *John Brown* was not aware of any such arrangement, for he applied to the board of property to have an adjustment of his claim. An order was made to divide the general survey in a particular manner, setting off the shares in severalty. This was done, and *John Brown* was allowed four hundred and fifty-one acres and eighty-four perches on *John Menough's* warrant; and the heirs of *William Menough* had three hundred and one acres and forty-three perches left to them. This not being satisfactory, in consequence of a mistake of the surveyor, as is alleged, a new order was made on the 2d of *January*, 1810, which was never executed. *John Brown*, disregarding the proceedings of the board, made at his own request, brought an ejectment to recover *John Menough's* tract, and, upon a full trial, had a verdict and judgment in his favour. Under it he has obtained the possession of his whole claim. If, then, *John Brown* has lawfully asserted his title, under *John Menough*, for part of this general survey, to whom does the remainder belong? The widow of *William Menough*, to whom *Ross* was married, died before the beginning of this suit, and any

(Ross and others v. M'Junkin and others.)

right which he had to the possession through her, has been consequently extinguished. The whole title, then, under *William Menough's* warrant, is vested in *M'Junkin* and *Davison*, who married his daughters, to whom he had devised it. If *John Brown* has got *John Menough's* share, the plaintiffs are entitled to the remainder. This seems very clear. But it is said, *Brown's* recovery is unlawful, for several reasons:—

“1. It is contended, that he was incapable of sustaining a suit for the land, because he had assigned it to trustees under the act of insolvency in *January*, 1800. To this objection, we need only say, that it appears to have been made a point at the former trial, and an exception taken in error before the Supreme Court. There has been an adjudication, by the highest tribunal, in this very case, and we are not disposed to disturb it. But,—

“2. It is said, that if he was capable of sustaining a suit, he could only recover according to the designation made under the order of the board of property. On this point, we say that the parties were not concluded by their proceedings; and *Brown* having appealed to his remedy in a court of law, had a right to recover according to the judgment of the court, and such quantity as that decision would allow him to have:—this also answers the third question.

“4. To the fourth we answer, that *John Brown* having recovered by the judgment of a court of law the quantity of land to which he was entitled under *John Menough's* warrant, the plaintiffs have an undoubted right to the balance. The adjustment of metes and bounds between the several parties, is a matter that does not concern *Ross*, who is there without right. It is an affair entirely between the plaintiffs and *Brown*. If they have designated and ascertained his *quantum* under the recovery, they have a right to oust *Ross* from the remainder. He is not, however, precluded, if he thinks he has a better right than *Brown*, from bringing his ejectment and obtaining the land. It seems than *John Menough* made a will shortly before he died, and subsequent to his deed to *Ryan*, in which he devised two hundred acres of this land to one *Blackheath*, and one hundred acres to the sons of *William Menough*, who conveyed to *Ross*. If he can overturn the deed to *Ryan*, and establish this will, he may yet obtain the land from *Brown*; but with this the plaintiffs have nothing to do.

“5. To the remaining question we answer, that the plaintiffs are not to be governed in their recovery by the proceedings of the board of property. They are entitled to the whole interest under *William Menough's* warrant, which includes all the land contained in the general survey, after satisfying *Brown's* claim, which has been done.”

To this charge the counsel of the defendants excepted, and, on the return of the record to this court, assigned errors as follows:

“1. That the Court of Common Pleas did direct the jury, and

(Ross and others v. M'Junkin and others.)

decide that *John Brown*, an insolvent debtor, discharged under the insolvent debtors' act of the 20th of *January*, 1800, could afterwards maintain and recover in ejectment, a tract of land mentioned in his schedule, and assigned by him to his assignees.

"2. That the same court did direct the jury, that *John Brown*, who had instituted proceedings by his *caveat* and petition to the Board of Property, could recover other and different lands from those allotted to him in the order of the said board, and that he might recover in severalty.

"3. That the same court did direct the jury, and decide that the plaintiffs below might recover in this action without an actual eviction from their possession by *Brown*, and before *Brown's* claim was laid off by metes and bounds, or otherwise.

"4. That the same court did direct the jury, and decide that the plaintiffs below might recover the lands in controversy from the defendants below, without regard or reference to the orders of the Board of Property, as specified in their last order of the 2d of *January*, 1810, which never was executed, and that *Brown's* recovery, being in severalty, entitled the plaintiffs below to the whole residue."

Ross, for the plaintiffs in error.

Baldwin, for the defendants in error.

The opinion of the court was delivered by

GIBSON, J. Had the record of the recovery by *Brown* been offered as evidence of his *title*, an objection to its competency would have raised a point of some difficulty. It, however, was admitted without objection, and, we must intend, in that view in which alone it would be clearly competent—to show the *fact* of a recovery by which *Brown*, claiming the title of *John Menough*, had elected to locate his warrant on the land recovered; of the value of which to the plaintiffs' case, I shall have occasion to speak again. In this view of the case, *Brown's* right to recover was altogether immaterial; but there was, in fact, no decisive objection to his title. Although the assignment of an insolvent debtor passes the legal estate in his land, yet a trust results by operation of law, which, as soon as the debts are satisfied, entitles him to the possession even against the assignees, *et a multo fortiori* against a stranger; and how can we say that *Brown* did not produce satisfactory evidence that the debts were paid? A lapse of fourteen years had intervened; constituting two thirds of a period sufficient of itself to raise a legal presumption of the fact. In the absence of proof to the contrary, all necessary intendments are to be made in favour of judicial proceedings. But it is sufficient that his right to recover adversely to the title of *William Menough*, was not involved in the issue; and this disposes of the assignment of the first two errors, which depend on the same principle.

The two points which remain, are also alike in principle. The

(Ross and others v. M'Junkin and others.)

warrants of *John* and *William Menough*, having been surveyed together, a general diagram of survey was returned, which contained no division line, nor any thing to distinguish the one tract from the other. On the petition of *Brown*, who claimed the warrant of *John*, the Board of Property ordered the proper surveyor to return a new survey, in which the tract of each should be designated. This order was never executed, but *Brown* recovered a particular part of the general survey, in an ejectment against two persons, who were respectively the tenants of the parties to the present suit; and it is contended, that the plaintiffs cannot recover, without showing that they were actually dispossessed of the part recovered by *Brown*; or without regard to the order of the Board of Property.

The nature of the interest, which the original owners of the warrants held under their joint survey, will go far to settle the rights of the parties before us. They were grantees from the state, not of an undivided interest in the whole, but of separate and distinct parts of the whole; consequently, they were not tenants in common. The grant to the one, would not have entitled him to possession in common of the whole; nor, if one had been disseised, could he have recovered an undivided portion from the other. The truth is, the survey was imperfect; and, although a valid appropriation of the land, as to strangers, it left their rights, as between themselves, suspended, till the subject of the grant to each should be specifically designated by the proper officer or by themselves. It has been held, that any number of warrants may be surveyed together by a common outline, so as to prevent a valid appropriation of any part of the land included, to subsequent warrants; and, it being a matter between the warrantees themselves, I can see no difference, whether the interior lines be laid down by protraction or not. But the separate owners of warrants thus laid, would certainly not have an interest in common in the land included in the general survey. Tenants in common, although their estates be several, have each an undivided interest in the whole; but it can with no propriety be said that each has an interest in the whole under the grant of a part. They could not join in trespass *quare clausum fregit*; but having supplied the deficiency in the original survey, by designating respectively the object of each grant, the title would relate to the commencement of the grant, as in ordinary cases, and then each might recover for himself. A writ of partition between *John* and *William Menough*, therefore, would not have lain; but their interests were separable by any act *in pais*. They were certainly competent to exercise as much power over the subject matter, as the surveyor, who was their agent, and who might have allotted to each his part by protracting a division line, or even by writing their names upon different ends of the parallelogram formed by the lines of the draught. Now, the correctness of the charge, that the plaintiffs might recover

(Ross and others v. M^cJunkin and others.)

without proof that they had been dispossessed by *Brown*, or without regard to the order of the Board of Property, depends on the nature and sufficiency of the evidence of designation by the acts of the parties, or those who represent them; a matter concerning which it is impossible to form an opinion, as the evidence does not all appear on the record; but being in any event a matter for the decision of the jury, it cannot be made the subject of error. But enough appears on the record to support the opinion of the court in point of fact. *Brown*, who stands in the place of *John Menough*, elected a particular part of the survey when he brought an ejectment for it, and this election is ratified on the part of the plaintiffs by the present ejectment for the residue. After this, does it lie in the mouth of a stranger and a wrong-doer, to say that the parties have not separated their interests? All the objections to the plaintiffs' title are merely technical, and certainly not entitled to peculiar favour; and we are well content in pronouncing that they have not been maintained.

Judgment affirmed.

AUG 18 1826

[PITTSBURG, SEPTEMBER 19, 1826.]

VICKROY *against* SKELLEY and another.

IN ERROR.

A paper, containing the draught of a survey, and a copy of field notes, endorsed, "*Fees paid T. V.,*" and "*sent to Mr. O'K., deputy surveyor of Cambria county, Dec. 8, 1807—J. A., D. S. B. C.*" which *I. P.*, the deputy surveyor of Cambria county, proved had been returned to him by *W. O'K.*, the former deputy surveyor of the said county; that the words "*Fees paid,*" appeared to him to be the handwriting of *G. W.*, formerly deputy surveyor of Bedford county, but the witness never saw him write, and knew his handwriting only by comparison, and that the rest of the indorsement was in the handwriting of *J. A.*, formerly deputy surveyor of Bedford county, who certified that he sent it to *O'K.*, but did not say where he found it, or that it had ever been in the office of the deputy surveyor of Bedford county, is not evidence.

If notice be given that a deposition will be taken at a certain house in the township of *N.*, in the county of *B.*, and nothing more appears than that it was taken in the county of *B.*, it cannot be read in evidence, unless the adverse party attended; which cures the defect.

A connected draught of eleven tracts of land, which came from the office of the surveyor general, by whom it was certified, that "it was a connected draught of eleven tracts of land, situate on the waters of Otter creek, and surveyed on warrants granted to the persons whose names are written on the plots respectively, all dated the 23d of July, 1773, except that to *R. I.*, which is dated the 22d of July, 1794," is not evidence to make title to the land in dispute; but it is evidence to show that the survey, under which the plaintiff claimed, did not interfere with others.

In the following instructions to the jury, held, that there was not error, viz. "If the warrant on which the plaintiff's survey was executed, was vague and inderscriptive, it ought to have been returned in a reasonable time, or a sufficient reason given for the delay. Here is a survey on a loose warrant, not returned by the officer to whom it was directed, but, nearly ten years afterwards, certified by his successor, on the representation of the plaintiff himself, that there were no interfering claims, although, from his letter to Dr. Smith, he knew there were, and also knew that the land was settled upon by the present defendant. It appears, further, that he had relinquished his claim under the survey, to Dr. Smith, and had declared to others he had no claim to any land on that side of the creek where that survey lies. If you believe all this, the survey ought not to attach, until actual return into the office; and, in that case, it gives no right to the land in question, if, as is the undisputed fact, the defendants had, six or seven years before the return and acceptance of the plaintiff's survey, entered upon the land as vacant, and, by actual residence and substantial improvements, acquired an equitable title."

After a warrant has been executed, but before a return, a new survey may be made on vacant lands, without a new authority; provided the warrant agrees to accept it, and it does not interfere with the intervening rights of third persons.

Upon the following proposition, viz. "The survey of *H. R.*, if a shifted survey, is to be considered as subsequent to the survey of *R. I.*, not being returned before the bona fide survey of the plaintiff," the court below charged, "The survey on *H. R.*'s warrant, if a shifted warrant, (but of which there is no satisfactory evidence) would give no title until actual return. But whether the plaintiff's warrant be, what the question presupposes, a bona fide one, and prosecuted with due diligence, is submitted to the jury on the evidence before them." Held, that in this charge there was no error.

WRIT of error to Cambria county.

Ross, for the plaintiff in error.

Alexander, for the defendants in error.

(Vickroy v. Skelley and another.)

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action of ejectment for a tract of land in *Cambria* county, containing four hundred acres, brought by the plaintiff in error against the defendants in error, in the Court of Common Pleas. The defendants obtained a verdict and judgment, but three exceptions to evidence, and seven to the charge of the court were taken by the counsel for the plaintiff.

The plaintiff claimed under a warrant to *Robert Irwin*, dated *January 22, 1794*, and a survey on the same on the 24th of *May, 1794*; and, having given the said warrant and survey in evidence, he offered a paper which he supposed to be official. This paper contained a draught of the survey and a copy of the field notes, and there were two indorsements on it. One of the indorsements was, "Fees paid *T. V.*;" the other, "sent to Mr. *O'Keiffe*, deputy surveyor of *Cambria* county, *December 8th, 1807*:" (signed) *J. Anderson, D. S., B. C.*" It was proved, by the oath of *Isaac Proctor*, deputy surveyor of *Cambria* county, that the paper was returned to him by *William O'Keiffe*, formerly deputy surveyor of the said county, and that the words, "*Fees paid*," appeared to the said *Proctor*, to be the handwriting of *George Woods*, formerly surveyor of *Bedford* county, but the witness had never seen him write, and knew his handwriting only by comparison. *Proctor* proved, that the rest of the indorsement was in the handwriting of Doctor *John Anderson*, formerly deputy surveyor of *Bedford* county. This paper was objected to by the defendants' counsel, and rejected by the court, whereupon the counsel for the plaintiff excepted to their opinion. This paper was liable to various objections. There was no certainty of its being an official paper. Doctor *Anderson* certified that he sent it to *O'Keiffe*, but he did not say where he found it, or that it had ever been in the office of the deputy surveyor of *Bedford* county. He should have been examined on oath, and then the defendants would have had an opportunity of cross-examining him. The handwriting of *George Woods* was not well proved. Comparison of hands alone is not evidence, except in case of public officers, who have been so long dead that better proof could not be expected. But there must be living persons capable of proving the handwriting of Mr. *Woods*. I am of opinion, therefore, that the court was right in rejecting the evidence.

The second exception was to the rejection of the deposition of *William Clark*, offered in evidence by the plaintiff. To this evidence the counsel for the defendants made several objections. First, that it did not appear that notice of the taking of the deposition was served on all the defendants. This objection might be got over. *John M'Donald*, who proved the service, swore, that he served copies of the notice, which may be intended, that he served a copy on each defendant. The service was proved by the affidavit of *M'Donald*, and if all the notices were really not served,

(Vickroy v. Skelley and another.)

the defendants might have brought the witness into court, and examined him. But there were other, and fatal objections to this deposition. The notice was, that it would be taken "at the house of *William Clark*, in the county of *Bedford*, and township of *Napier*." Now, it did not appear that it was taken at the house of *William Clark*, by the certificate of the justice before whom it was taken, or by parol evidence; either of which would have been sufficient. The justice certifies, that it was sworn and subscribed by the witness, before him, on the 28th day of *June*, 1821. But *where* the deposition was taken does not appear, except that it was in *Bedford* county, which may be inferred from the words, "*Bedford* county, ss.," at the head of it. This point was expressly decided, in *Selin v. Snyder*, 7 *Serg. & Rawle*, 166. There the notice was, that depositions would be taken "at the house of *Adam Weaver*, inn-keeper, in the borough of *Lancaster*." Depositions were taken before a justice of the peace of *Lancaster* county on the day appointed, but it did not appear where they were taken, except in the county of *Lancaster*. It was held by this court, that the depositions so taken, were not evidence; that it was incumbent on the party who offers a deposition, to prove that it was taken according to the notice, unless the adverse party attended, in which case the defect would be cured; that the defendants might have proved, by *parol* evidence, that the depositions were taken according to the form of the notice, though not so certified by the magistrate. But no such proof having been given, it did not appear that the deposition was taken at the house of *Adam Weaver*, and therefore it was not evidence. That case is not to be distinguished from the one now before us. The deposition of *William Clark*, therefore, was properly rejected.

Another deposition of *Clark's* was also offered in evidence, which was taken at a former trial. There was no error in rejecting this, because the parties were not the same as in this cause; nor did it appear that *Clark* was not living, and within the jurisdiction of the court. Indeed there was no doubt that he was living, and within its jurisdiction.

The third exception was to the rejection of a connected draught of eleven tracts of land, offered in evidence by the plaintiff. This draught came from the office of the surveyor general, by whom it was certified, "that it was a connected draught of eleven tracts of land situate on the waters of *Otter* creek, or little *Conemaugh*, in the county of *Bedford*, surveyed on the warrants granted to the persons whose names are written on the plots respectively, all dated the 23d of *July*, 1773, except that to *Robert Irwin*, which is dated the 22d of *July*, 1794." Such a draught would not have been evidence to *make title* to the land in dispute. In order to *make title*, the return of survey should be produced, as well as the authority under which it was made. But where the object is only *illustra-*

(Vickroy v. Skelley and another.)

tion, as in the present case, to show that *Robert Irwin's* survey did not interfere with the others, it has been usual to admit this kind of evidence. It is very convenient, saves considerable expense in obtaining a copy of each survey, and is attended with no danger. It is true that this is not a certified copy of any draught of record in the office of the surveyor general, and it was objected, that to admit it in evidence would be contrary to the act of the 31st of March, 1823, (*Purd. Dig.* 258, *Pamph.* 233,) by which "copies of all records, documents, and papers, in the office of the secretary of the commonwealth, secretary of the land office, surveyor general, auditor general, and state treasurer, when duly certified by the officers of the said office respectively, shall be received in evidence in the several courts in this commonwealth, in all cases where the original documents and papers would be admitted in evidence." But it is certain, that this act, so far as concerned the office of the surveyor general and secretary of the land office, was but affirmative, because certified copies of the papers in those offices, had always been admitted in evidence before. It has been several times held by this court, that a certificate from one of those officers, that a certain paper, for example a return of survey, *was not in his office*, might be received in evidence. This practice had been established before I came on the bench, and therefore I yielded to it, though not strictly reconcilable with principle. It must be granted, too, that a connected draught, certified by the surveyor general, is not the best evidence the nature of the case admits of, because you might produce certified copies of each survey, and the warrant under which it was made. But we know, that, to avoid inconvenience, the rule which requires the best evidence, has been often relaxed. We are in the constant practice of receiving as evidence, papers which require the certificate of a judge, or justice of the peace, with no other proof of the person's being a judge or justice than his own assertion. Yet his commission, or a certified copy of it, if recorded, would be better evidence. I am aware of a decision of the Circuit Court of the *United States*, in the case of *Griffith's Lessee v. Tunckhouser*, (1 *Peters*, 421,) that a connected plot of different tracts made out and put together in the land office, was not evidence, because it did not profess to be a copy of any plot on record in the office. My great respect for that court raised the only difficulty I have felt on this question. I should be disposed to follow its precedent, were it not that I am satisfied it is contrary to the practice which has prevailed in our courts, and that practice, sanctioned too, as it seems, by the opinion of the legislature. For in the fee bill of the 28th of March, 1814, (*Purd. Dig.* 280, 6 *Sm. L.* 228,) a fee is allowed to the surveyor general "for connecting separate draughts into one general draught; for each separate draught therein—twenty-five cents;" and another fee of twenty-five cents, "for certifying and affixing the seal of office to the same." I cannot help supposing

(Vickroy v. Skelley and another.)

that these fees were given, because it was known that such draughts were often wanted, to be given in evidence in courts of justice. The expense of a certified copy of each separate survey, and the warrant or application under which it issued, would, in many cases, be very considerable; and there is little danger of the officer's certifying a falsehood, in which he would be open to detection from his own records. I am therefore of opinion, that there was error in rejecting the evidence.

The remaining exceptions are to the charge of the court; and, to judge of them, we must keep in view some of the principal features of the evidence. *Robert Irwin's* warrant, under which the plaintiff made title, dated the 22d of *January*, 1794, was for four hundred acres, "in the forks of the north and south fork of little *Conemaugh*, in the township of *Quenaboring*, *Bedford* county." The survey on this warrant was made on the 24th of *May*, 1794, and a copy thereof certified on the 4th of *February*, 1804, by the then deputy surveyor, and addressed to the then surveyor general, by whom it was accepted. The defendants claimed under an improvement commenced in the year 1797, or 1798. The defendants also gave in evidence two warrants, one in the name of *Hugh Rogers*, the other of *Randal M'Allister*, dated in the year 1773, on which surveys were made in 1784; and after showing other warrants and surveys adjoining the former, they endeavoured to prove that these two surveys comprehended great part of the land claimed by the plaintiff. They gave in evidence, too, the copy of a letter from the plaintiff to Dr. *William Smith*, deceased; and parol evidence was given by both parties in support of these pretensions.

The President of the Court of Common Pleas charged the jury to the following effect:—"If the warrant on which the plaintiff's survey was executed was vague and indescriptive, it ought to have been returned in a reasonable time, or a sufficient reason given for the delay. Here is a survey on a loose warrant, not returned by the officer to whom it was directed, but, nearly ten years afterwards, certified by his successor, on the representation of the plaintiff himself, that there were no interfering claims; although, from his letter to Dr. *Smith*, he knew there were, and also knew that the land was settled upon by the present defendants. It appears further, that he had relinquished his claim under the survey to Dr. *Smith*, and had declared to others, he had no claim to any land on that side of the creek where that survey lies. If you believe all this, the survey ought not to attach, until actual return into the office; and, in that case, it gives no right to the land in question, if, as is the undisputed fact, the defendants had six or seven years before the return and acceptance of the plaintiff's survey, entered upon the land as vacant, and, by actual residence and substantial improvements, acquired an equitable title."

I perceive no error in this direction. The law, with respect to

(Vickroy v. Skelley and another.)

warrants of vague description, was accurately laid down; although, in speaking of laches in returning a survey, it would have been better if the jury had been told, that the owner of the warrant is not to be prejudiced by the neglect of the deputy surveyor, leaving it to them to decide whose the neglect was. It was left to the jury; for the judge, in the conclusion of his charge told them, "that if they believed the evidence adduced for the defendants, and were satisfied that the plaintiff had unreasonably delayed having his survey returned, the verdict should be for the defendants."

The plaintiff's counsel complained particularly of that part of the charge in which the jury were told, "that the plaintiff had relinquished his claim to Dr. *William Smith*." That was a matter of fact, of which the jury would judge from the evidence, and, if the judge was mistaken in his opinion on that point, they were not bound by it, but might correct him. Indeed the judge did directly afterwards submit this, among other facts, to the jury. It was not an error in *law*, and so we have frequently determined. The observations I have made will apply to the plaintiff's first five exceptions to the charge, with one additional remark, that several of the exceptions are not supported in fact, because the judge is supposed to have said what he did not say, or what he said only hypothetically. But, besides these general exceptions to the charge, the plaintiff has assigned error in the judge's answer to two points specially proposed to him.

1. It was charged, "that if the late Judge *Smith* (then a deputy surveyor,) executed the warrants of *Rogers*, &c. in 1773, without returning them, new surveys might afterwards be made, on vacant lands, without a new authority, provided the warrantees agreed to accept them." If a survey is returned, there is an end of all authority under the warrant, and no new survey can be made, nor any alteration of the return, without new authority from the land office. But, until a return is made, the general principle is, that although a survey be made, it may be altered by consent of the warrantee. It has always been held, that a lost warrant may be laid on any vacant land, and that the owner of an application may shift his ground, and take up any vacant land, provided nevertheless that a third person, who has acquired a right of appropriation, shall not be injured. These principles will be found in the cases of *Healy v. Moul*, &c., 5 *Serg. & Rawle*, 181, *Steele v. Finlay*, 2 *Sm. L.* 255, and *Hepburn v. Levy*, 4 *Dall.* 218.

The title, under a shifted application, does not commence until the return of survey, except against one who has *notice* of it before the return, and then it commences from the time of notice. *Kyle v. White*, 1 *Binn.* 246. *Bond v. Stroup*, &c., 3 *Binn.* 66. There is little or no difference between an *altered* and a *new* survey. There is certainly no difference as to the commonwealth, and, as to third persons, they are protected. If they have appropriated the land, they will hold it against either an altered or a new survey.

(Vickroy v. Skelley and another.)

In the opinion of the court delivered by Judge DUNCAN, in *Healy v. Moul.* (5 Serg. & Rawle, 187,) it is said, "I do not question the right of an owner to have his lines extended, if his warrant be not filled; nor do I doubt of the right of the deputy to *alter* his original survey, to throw out, or take in other lands, provided this is done shortly, and does not interfere with mesne rights between the time of the original survey and the alteration before the return. But when the survey is returned, the deputy is *functus officio*, and it requires a new authority from the surveyor general, or the Board of Property, to warrant such alteration." Considering, then, the principles thus positively established, and the analogy between them and the case of a *new survey*, I am of opinion that the charge of the court on this point was right.

The other proposition submitted to the court was this:—"The survey of *Hugh Rogers*, if a shifted survey, is to be considered as subsequent to the survey of *Robert Irwin*, not being returned before the *bona fide* survey of the plaintiff." As to this, the court charged, "The survey on *Hugh Rogers'* warrant, if a shifted warrant, but of which, as has already been stated, there is no satisfactory evidence, would give no title until actual return. But whether the survey on the plaintiff's warrant be, what the question presupposes, a *bona fide* one, and prosecuted with due diligence, is submitted to the jury on the evidence before them." I perceive no error in this answer, or at least none which was prejudicial to the plaintiff. The plaintiff had no right to ask the court to assume the fact of his survey being *bona fide*; and, without the assumption of that fact, the question of law did not arise. Neither could the plaintiff recover, if the jury should be of opinion that his survey was not prosecuted with due diligence, because then the right of the defendants under their improvement and settlement would prevail, and it would be immaterial whether *Rogers'* survey took preference to *Irwin's* or not. I am of opinion, on the whole, that there was error in rejecting the connected draught offered in evidence by the defendants, and in no other part of the record.

The judgment is to be reversed, and a *venire facias de novo* awarded. •

[PITTSBURG, SEPTEMBER 19, 1826.]

STEER, for the use of FARRELL, *against* STEER and another.

IN ERROR.

Coverture may be pleaded in abatement or in bar, according to circumstances. In an action of debt on a bond, executed by the defendants directly to the plaintiff, during her coverture with one of them, coverture is a plea in bar.

ON a writ of error to the Court of Common Pleas of *Armstrong* county, it appeared that an action of debt was brought in the court below, to *September* Term, 1821, by *Martha Steer*, the plaintiff in error, for the use of *Horatio Farrell*, on a bond executed by *Bernard Steer*, her husband, and *Isaac Townsend*, the defendants in error. After the defendants had appeared by attorney, a declaration had been filed, a rule to take depositions, and several rules to plead entered, the defendants, on the 17th of *September*, 1822, filed, together with other pleas, a plea of the coverture of the plaintiff with *Bernard Steer*, one of the defendants. The plaintiff demurred to the plea of coverture, and the defendants joined in demurrer. The court below gave judgment for the defendants.

Alexander, for the plaintiff in error, contended that the plea of coverture was not a plea in bar; and that after three continuances, it could not be received as a plea in abatement. He cited and relied upon, 1 *Com. Dig. Abatement*, p. 12. 1 *Chitty Pl.* 436, 437, 438, (*margin.*) *Ruble's Executors v. Boileau*, 10 *Serg. & Rawle*, 208.

Stannard, *contra*, said, the question is, whether a married woman can support an action against her husband? The plea goes, not to show that this action cannot be maintained, but that the plaintiff *can never recover*, and is therefore a plea in bar. 1 *Chitty Pl.* 434, (*margin.*) Coverture is generally a plea in abatement, 1 *Chitty Pl.* 462, (*margin.*) But, under some circumstances, it may be pleaded in bar. *Id.* 438, (*margin.*)

The opinion of the court was delivered by

GIBSON, J. Coverture may be pleaded in abatement or in bar, according to circumstances. Agreements between a man and a woman, without the intervention of trustees, are extinguished by a subsequent marriage, if they are not to be executed till after the coverture, in which case they survive. But nothing is better established, than that during the coverture, neither can grant to the other any estate or interest, nor enter into any covenant or contract directly with the other. This depends on the intimate union of person which arises from the contract of marriage, and which is so perfect that they are looked upon as one. For this reason,

(Steer, for the use of Farrel, *v.* Steer and another.)

the husband's contract with his wife, is, in contemplation of law, made with himself, and is, for that reason, absolutely a *non entity*. Now, here the defendants, during the coverture of the plaintiff with one of themselves, executed the bond in question directly to the wife; and she insists that the coverture is pleadable to an action on it, only in abatement. But the defence is not merely the disability in respect of maintaining an action in her own name, but the total absence of every thing like responsibility or a cause of action. This is altogether unlike an action on a bond to the wife from a third person, in which there is a valid cause of action, and the non-joinder of the husband is therefore to be pleaded in abatement. Here the defence goes to the root of the demand; and, as it is impossible to give the party a better writ, it can be pleaded only in bar. For these reasons, we are of opinion the demurrer was properly overruled.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 19, 1826.]

M'KEE and others *against* STANNARD.

IN ERROR.

A bond given by an insolvent debtor, with sureties, in order to obtain his discharge from imprisonment, by virtue of the act of the 28th of *March*, 1820, with condition, that "if the insolvent debtor should be and appear at the next court of Common Pleas, then and there to make application for the benefit of the several acts for the relief of insolvent debtors, and should abide all orders of the said court in and about the premises, then the said obligation should be void; otherwise it should remain in full force and virtue," varies substantially from the bond prescribed by the act, and is void.

WRIT of error to the Court of Common Pleas of *Indiana* county.

After argument by *White* and *Foster* for the plaintiffs in error, and by *Alexander*, contra, the opinion of the court was delivered by—

TILGHMAN, C. J. This was an action of debt on bond, brought by *Daniel Stannard*, the defendant in error, against *James M'Kee* and others, the plaintiffs in error. The following is the substance of the case, as it appears on the record, on a demurrer by the defendants to the plaintiff's replication. *James M'Kee* having been arrested on a *capias ad satisfaciendum* issued against him on a judgment obtained by the said *Daniel Stannard*, in order to obtain his discharge from imprisonment, by virtue of an act passed the 28th of *March*, 1820, gave bond, with the other defendants, his sureties, to the said *Stannard*, with condition, "that, if the said *M'Kee* should be and appear at the next Court of Common

(M'Kee and others v. Stannard.)

Pleas of *Indiana* county, then and there to make application for the benefit of the several acts for the relief of insolvent debtors, and should abide all orders of the said court, in and about the premises, then the said obligation should be null and void, otherwise it should remain in full force and virtue." M'Kee appeared at the next Court of Common Pleas of *Indiana* county, and exhibited his petition for the benefit of the insolvent act, whereupon the court appointed another day for his appearance, and ordered him to give notice thereof to his creditors; but he neither gave such notice, nor appeared himself on the day appointed.

There is no doubt, that by thus failing to comply with the orders of the court, the condition was broken and the bond forfeited. But the defendants contend, that nevertheless the plaintiff is not entitled to recover against them, because the condition was not according to the act of assembly, and therefore the bond was void. The condition prescribed by the act, is, "that the said debtor shall be and appear at the next Court of Common Pleas for the said county, then and there to take the benefit of the insolvent laws of this commonwealth, *and to surrender himself to the jail of the said county, if he fail to comply with all things required by law, to entitle him to be discharged, and generally to abide all orders of the said court.*" Now, the condition of the bond given by the defendants differs from that required by the law in an important particular; viz. in omitting that part which relates to the debtor's surrendering himself to prison. The consequence of this omission is, that although he should surrender himself, the bond would be forfeited, because he did not comply with the order of the court to give notice to his creditors. In fact, for any thing that appears on the record, he may have surrendered himself. The plaintiff does not aver that he did not, in the breach assigned in his replication; nor could such a breach have been properly assigned, because the condition of the bond makes no mention of a surrender, neither could the defendant have pleaded his surrender, or, if he had, the plea would have been bad on demurrer. Thus, we see that the defendant and his sureties were deprived of the advantage intended them by the act, of avoiding the forfeiture of the bond, by a surrender. Taking for granted, then, that the condition of this bond is substantially variant, from the act of assembly, what is the consequence in law? I consider it clear that the bond is void. It is not a voluntary bond, but one that is given to obtain a discharge from imprisonment; and this discharge the debtor is entitled to, on the conditions prescribed by law; but this bond binds him to harder conditions, and the plaintiff had no right to exact them. The law, as I have laid it down, is supported by the best authority. In the case of *Armstrong v. United States*, (1 *Peters*, 46, 47,) it was decided, that an official bond given by a collector of the internal revenue of the *United States* was void, as to that which bound him and his sureties to

(M'Kee and others v. Stannard.)

account for money collected *before the date of the bond*, because the act of congress, under which it was taken, extended only to money collected *after the date*. But there is *no dividing* the obligation at present before us. From the nature of the omission, the bond must be void *in toto*. This court had occasion to consider the matter now under consideration, in two cases decided the last term: *Cochran &c. v. M'Knight*, and *Beacom v. Holms, &c.** And in both it was held, that a bond substantially differing from the act of assembly, was absolutely void.

I am therefore of opinion, that the bond of the defendants was void, and judgment should have been given for them on the demurrer. The judgment is to be reversed, and judgment entered in this court for the plaintiffs in error.

Judgment below reversed, and judgment
in this court for the plaintiffs in error.

[PITTSBURG, SEPTEMBER 19, 1826.]

MILLER *against* M'BRIER.

IN ERROR.

If the plaintiff in ejectment, claims both on an original title and by virtue of a lease from him to the defendant, it is competent to the defendant to defend on both grounds; and it is error in the court to assume the existence of the lease, and prohibit the defendant from showing that the title is not in the plaintiff, but a third person.

A tenant may impeach his landlord's title, whenever he can show that he was induced to take a lease by misrepresentation and fraud.

An agreement by a person in possession of land, to abandon the premises at a certain day, is not a lease, and does not estop him from controverting the title of the person with whom the agreement was made.

ERROR to the Court of Common Pleas of *Westmoreland* county, in an ejectment by *Nathaniel M'Brier*, the defendant in error, against *Jesse Miller*, the plaintiff in error

The plaintiff below claimed the land in dispute under an application dated the 4th of *April*, 1769, in the name of *John Fleming*, a survey thereon, dated the 25th of *June*, 1772, and a patent to the plaintiff, dated the 29th of *December*, 1814, which recited a deed to him from *John Fleming*, dated the 18th of *October*, 1814.

It appeared from evidence produced by the plaintiff, that the defendant had been in possession of the land in dispute for the space of twelve or fourteen years before the institution of the action, and had made improvements upon it. The plaintiff produced

* See 13 *Serg. & Rawls*, 190.

(Miller v. McBrier.)

his patent to the defendant, and it was agreed, that it should be determined by referees what compensation the defendant should receive for the improvements he had made. The referees made no award, and the defendant received no compensation for his labour. But an agreement was entered into, which the plaintiff alleged to be a lease, by which it was stipulated that the defendant should occupy the premises until the 1st of *April*, 1816, and then give peaceable possession of them to the plaintiff. The defendant was afterwards asked by the plaintiff, at what time he intended to leave the place; to which he replied, that he was not ready then, but if he would give him nine or ten days, he would be ready.

The defendant offered in evidence the deposition of *John Menough*, the object of which was to show that *John Fleming*, who originally located the land under the application given in evidence, was at so advanced an age, in the year 1769, that his death, before the title set up by the plaintiff had accrued, might be fairly presumed by the jury, and that therefore the patent had been surreptitiously obtained. The plaintiff's counsel objected to the evidence. The court rejected it, and sealed a bill of exceptions.

The defendant then offered a witness to prove that the plaintiff had procured him to draw a deed poll for the land in dispute from a person who was not the owner of it; and that, upon the deed thus executed he obtained the patent which he gave in evidence. He further offered to prove that *John Fleming*, the original owner of the application, had been dead upwards of thirty years before the trial of the cause. To all this evidence the plaintiff's counsel objected; and, the court having rejected it, exception was taken to their opinion.

In charging the jury, the court below said, "It is possible the plaintiff may have imposed upon the state, or rather upon a certain *John Fleming*, or his legal representatives; but of this you have no testimony. If, in rejecting what was offered on this subject, we have been mistaken in point of law, the defendant has a remedy in a higher tribunal, and we shall be happy, in that case, to have our error set right. There is certainly no testimony of any direct fraud or imposition of the plaintiff on the defendant at the time of the execution of the contract of lease. There may have been fraud, but there is no proof of it at this time. It is not to be presumed on slight grounds; still less on mere surmises, without any pregnant circumstances to support it. But even if the fraud did exist, and had been fully proved, it is one which principally affects another person or persons, and not the defendant. The defendant having voluntarily placed himself as a tenant, and acknowledged the title of the plaintiff, whatever it was, or may hereafter turn out to be, his term having expired, and he having, after its expiration, asked for further time, which was granted, he ought not now to be allowed to call the plaintiff's title

(Miller v. McBrier.)

in question." The plaintiff's counsel excepted to this opinion of the court.

Foster, for the plaintiff in error.

1. The deposition of *John Menaugh* tended to show, that the defendant, who was a settler on the land in dispute, was induced to recognize the plaintiff's title, in consequence of his false representation that he was the real owner. It ought, therefore, to have been received in evidence.

2. The evidence offered, to prove that the plaintiff had a deed executed by a person who was not the owner of the land, and that upon that deed he obtained his patent, would have clearly established a fraud, and ought to have been admitted.

3. The rejection of evidence of the death of *John Fleming*, the real owner of the location, long before his supposed deed poll bore date, was wrong, upon the same principle.

4. There was error in the charge of the court below, that although the agreement between the plaintiff and defendant was without consideration and fraudulent, it was binding on the defendant. The agreement was not a lease, and did not create a tenancy,—to constitute which, there must be a render of rent or service. But, if it was a lease, the defendant is not estopped by it. A tenant or lessee may controvert the title of his lessor, if the lease was obtained by force, fraud, or any unfair means. 2 *Bl. Com.* 41, 59. 4 *Binn.* 283. 2 *Binn.* 468. *Hamilton v. Marsden*, 6 *Binn.* 45.

Alexander and Coulter, for the defendant in error.

Nothing can be more clear, than that a tenant cannot dispute the title of his landlord. *Bauders v. Fletcher*, 11 *Serg. & Rawle*, 420. If, indeed, the lease be fraudulently obtained, the title may be controverted. But there was no fraud in making or procuring the lease in this case. The offer only was to prove, that the plaintiff obtained his patent upon a forged deed; a circumstance which did not affect the defendant, who had recognized that title.

It is immaterial whether the agreement was a lease or not. It was a writing under seal, by which, in consideration of the improvements he had made upon the land, the defendant was permitted to retain the possession for a limited time, and then give it up to the plaintiff. No consideration was necessary, because the agreement was a sealed instrument. But if a consideration was necessary, the permission to enjoy the land until the next spring, and have the crop in the ground, was a sufficient consideration. He ought to be compelled to keep his faith by performing his contract.

The opinion of the court was delivered by

GIBSON, J. These bills of exception all depend on the supposed conclusiveness of what I shall for the present call the lease. That

(Miller v. M'Brier.)

a tenant cannot deny his landlord's title, is certain; and, by an application of this rule to the circumstances of the case, the court excluded the evidence with which the defendant offered to impeach an *original* title, with which also the landlord set out. Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be redelivered to him, it being no answer to say he is not the owner of the land. But where, as in this case, he claims on the separate grounds of original title, and as having parted with the possession pursuant to a lease, the defendant will be permitted to meet him separately on each. Here the plaintiff showed an office title, apparently sufficient to entitle him to the land. He also showed an agreement, said to be a lease, which, independently of his office title, entitled him, as he said, to the possession; and the court, assuming the existence of this agreement as a valid lease, prohibited the defendant from showing that the office title was not in the plaintiff, but a third person. It is plain, therefore, that the defendant may have been exposed to the office title with his hands bound, although he may have succeeded in disproving the existence of the lease to the entire satisfaction of the jury; and thus, for the purpose of excluding one branch of the defence, the court assumed the very fact that was put in issue by the other.

It appeared, from the plaintiff's own evidence, that previous to the execution of the agreement called a lease, he had exhibited to the defendant and others his office title, consisting of a patent, in which is recited a location and conveyance from the person who had taken it out; and the defendant then offered to prove that this conveyance was a forgery, and that the patent was procured by fraud and surprise. Now, beside that what has just been said is equally applicable to this point, there is another reason why the evidence was indisputably competent. A tenant may impeach his landlord's title, whenever he can show that he was induced to accept of the lease by misrepresentation and fraud; and the exhibition of a title founded in forgery, to induce a person already in possession to accept of a lease, is an act whose character is too unequivocal to be doubted. The evidence, therefore was admissible to show that the agreement was procured by imposition and deceit.

But I cannot discover in this agreement a single feature of a lease. It contains neither words of demise, nor reservation of rent, nor any other part of a regular lease. These ingredients, no doubt, are not essential, it being sufficient if it appear to have been the intention of the lessor to dispossess himself of the premises, and of the lessee to enter pursuant to the agreement. In our case, however, the agreement was nothing more than that a person already in possession under a claim of title should abandon the premises at a day certain. For a breach of this, an action would lie,

(Miller v. McBrier.)

but it created nothing like tenure; nor could it operate as an estoppel. It will be perceived, therefore, that the foundation of the whole fails.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 19, 1826.]

FOSTER *against* SWEENY.

IN ERROR.

Appearance to a foreign attachment, entry of special bail to dissolve the attachment, and confession of judgment by the defendant for a smaller sum than the amount claimed, are not a waiver of the right of the defendant to maintain an action against the plaintiff in the attachment, for maliciously and wrongfully suing out a writ of foreign attachment against him, when he was not within the purview of the attachment laws.

ERROR to Venango county.

Edward Sweeny, the defendant in error, brought this action on the case in the Court of Common Pleas of *Venango* county, against *James Foster*, the plaintiff in error, for maliciously and wrongfully suing out against him a writ of foreign attachment, when he was not, by law, liable to such process.

From the record, it appeared that *Foster* issued a writ of foreign attachment against *Sweeny*, returnable to *May* Term, 1823, of the Common Pleas of *Venango* county, by virtue of which the sheriff attached several acres of grain in the ground, and a considerable quantity of personal property belonging to *Sweeny*. On the 9th of *July*, 1823, on motion and affidavit filed, an order was granted for the sale of the perishable property. On the 27th of *August*, 1823, a motion was made on behalf of the defendant to quash the attachment, which the court after argument overruled. Judgment was entered on the 28th of *February*, 1824, and, on the 25th of *May*, 1824, the attachment was dissolved by the entry of special bail, in the sum of fifty dollars. On the 1st of *March*, 1825, judgment was entered for the plaintiff by consent, for ten dollars and twenty-seven cents, for which a *fieri facias* issued to *May* Term, 1825.

On the trial of the principal action, the plaintiff, to show that he was not liable to the process of foreign attachment, offered evidence to prove that at the time it was laid, he was in the state of *Pennsylvania*, to prove also the situation of his family while he was absent from them, and the value of the property attached. The defendant's counsel having objected to the evidence, the court admitted it, and sealed a bill of exceptions.

Bankes, for the plaintiff in error, said that the judgment of the Court of Common Pleas in the attachment was conclusive. The

(Foster v. Sweeny.)

defendant in that action, having confessed judgment after the entry of special bail, was not entitled to give evidence on the trial of the present action, that he was not liable to a foreign attachment.

Galbraith and *Ayres*, for the plaintiff in error, observed, that the Court of Common Pleas did not decide the question whether or not a foreign attachment would lie, but refused to quash it, because the motion for that purpose was not made at the first term. *Miltenberger v. Lloyd*, 2 *Dall.* 79. The fact was, the defendant in the attachment was out of the county when his property was attached, and did not know of the attachment in time to apply at the first term for redress by quashing the writ.

The opinion of the court was delivered by

GIBSON, J. The motion to quash was overruled, and the defendant had no alternative but to enter special bail or see his property sacrificed for what was in fact not due; for although he afterwards confessed judgment, it was for but a part of what was originally demanded. An appearance, thus extorted, is surely not an admission that the means employed were legal; and a creditor cannot compel payment, even of a just debt, by illegal means. A debtor whose person has been taken in execution, in violation of the act of assembly, which subjects property to execution in the first instance, might undoubtedly have his action after payment of the debt. Having acted on compulsion, the maxim, *volenti non fit injuria*, would be inapplicable to him. The injury from an attachment may be not merely speculative. There are junctures in the affairs of every man, in which ruin would be the inevitable consequence of having his property locked up in the law; and it would be monstrous, in such a case, to require him either to be a passive spectator till the consequences should be complete, or to relinquish all claim to indemnity for the past. Beside, he might, by this illegal means, be compelled to enter special bail, when he ought to be discharged on filing common bail. But it cannot be doubted, that to attach the property of a debtor who is not within the purview of the attachment laws, is an abuse of the process of the court, for which an action lies; and, as we are of opinion that the appearance and confession of judgment were not a waiver of the injury in this particular instance, it follows that there is no error in the record.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 26, 1826.]

MOORE *against* SMITH.

IN ERROR.

In ejectment, the plaintiff made title to lot No. 1028, in the Fifth Donation District, and the dispute being about its locality, after having examined several witnesses, the object of whose testimony was to prove that the tract in possession of the defendant was No. 1028, offered in evidence the record of an ejectment brought by one *M.* against the plaintiff, and the recovery of another tract of land, on which the plaintiff lived and claimed as No. 1028: *held*, that the record was not evidence of any particular right. But evidence having been given on the cross-examination of one of plaintiff's witnesses, of the plaintiff's residence on the land which *M.* recovered from him, and that he continued in possession of that tract as No. 1028, and the witness having testified, that as far as he knew, he had lived there ever since, and that he understood he was the tenant of *M.*: *held*, that the record became evidence for the purpose of explaining what had become of his possession of *M.*'s tract, and that he had by mistake seated himself upon it as No. 1028.

After the sale of part of a tract of land to one who holds in severalty the part sold, the declarations of the vendor, in a dispute with a third person, are not evidence, to affect the rights of the vendee. In order to affect a person by conversations or declarations made in his presence, they must be made to him, in such a manner as requires him to deny, or by his acquiescence, to admit them. Therefore where A., who claimed a tract of land, attended as chain-bearer, a jury of view, in a controversy between B. and C., conversations between B. and C. relative to the locality of the tract claimed by A., are not evidence against him.

EJECTMENT in the Common Pleas of *Mercer* county, in which *John Smith*, the defendant in error, was plaintiff, and the plaintiff in error, *John Moore*, defendant.

It appeared from the record, that the plaintiff below made out a title to lot No. 1028, in the Fifth Donation District, and the question which arose on the trial was as to its locality. After having examined several witnesses, the object of whose testimony was to show, that the tract for which the suit was brought was lot No. 1028, he offered in evidence the record of an ejectment brought by *John Martin, jr.*, against *William Smith*, and the present plaintiff, *John Smith*, for a Donation Tract of land, which, it was admitted, *Smith* claimed under his title and patent for No. 1028. To the admission of this record in evidence, the defendant's counsel objected, and the court overruled it.

The plaintiff afterwards produced as a witness, *Allan Dunn*, who after having stated, among other things in his examination in chief, that he was told both by *Moore*, the defendant below, and one *Herrington*, that *Moore* had purchased from *Herrington* one hundred and forty acres of lot No. 1028, which the witness surveyed off for him, testified in his cross-examination, that *Smith* lived on the land which *Martin* had recovered from him, claiming it as No. 1028, and, as far as the witness knew, ever since, and was, as

(Moore v. Smith.)

he understood, the tenant of *Martin*. The record of the action of *Martin* against *Smith* was again offered in evidence, when it was objected to by the defendant's counsel, but the court "permitted the said record to be given in evidence to the jury for some purpose; but, as to the effect and operation of it," declared "that the parties were entitled to the opinion of the court in charge to the jury."

This opinion, which was excepted to by the defendant's counsel, was the first error assigned in this court.

In the course of the trial in the court below, the plaintiff produced a witness, who testified as follows: "I was along when Sheriff *Sanky's* jury, in the case of *Herrington v. Thompson* and *Bowman*, was upon this land, in 1807. Mr. *Herrington*, *John Moore*, and many others, the neighbourhood generally, and *Bowman* were along; *John Moore* was then claiming the land where he now lives. I understood, from *Moore* and *Herrington*, that *Moore's* father had bought of *Herrington* upwards of one hundred acres of land for *Moore*. At the white oak on the district line, there was a warm dispute between *Herrington* and *Bowman*, as to the number on the white oak: *Herrington* said it was 1028, *Bowman* contended that it was the corner of 1026, and *Herrington* said that it was the numbered corner of 1028. He further stated, that south of that, further south on the south bank of *French*, was 1029, on a small maple. This is where *Bowman* wanted to locate 1027. The jury examined the maple carefully. *Herrington* asked *Bowman* how he could locate 1027, where 1029 was? There was considerable altercation; some between *John Moore* (the defendant) and myself. *Moore* said, "This will fix Old Donation." (*Bowman* went by the name of Old Donation.) *Herrington*, at that place, said to the jury, that at the length of one tract south ought to be the corner No. 1030, but that he never had seen it. When we found the white oak marked MXXX., *Herrington* said with exultation, "You have found what I never could find." *Herrington* said to the jury, that on one lot further south was 1031; and one further south again, was a hickory not numbered. *Moore* was along. My impression is, he carried the chain. *Bowman* said to *Herrington*, "This is a spurious number." I thought it might be so, and the same evening I took a chisel, and cut out the middle X., and found it counted to the date of the original survey. *Moore* did not dispute the number on these trees. Nobody disputed them but *Bowman* and *Thompson*."

To all this evidence, so far as it relates to what was said by *James Herrington*, the counsel for the defendant objected, and its admission by the court, was the second error assigned.

Selden and *Wallace*, for the plaintiff in error.

1. The record of the ejectment brought by *Martin* against *Smith*, was between other parties, and therefore not evidence.

(Moore v. Smith.)

Peake, 38. The bill of exceptions does not state for what purpose it was admitted, but the judge said he would instruct the jury as to its effect. But this could not remove the impression it was calculated to make upon the minds of the jury. For this reason, it is error to read to the jury an award of arbitrators, although the court charge the jury that it ought not to have the least weight as evidence of title. *Shaeffer v. Kreitzer*, 6 Binn. 432, 433. And the principle may be laid down generally, that if evidence be erroneously admitted, the error is not cured by the court telling the jury, before a bill of exceptions is actually signed, that they ought to pay no regard to it. *Nash v. Gilkeson*, 5 Serg. & Rawle, 352. We contend, that the record was offered in evidence to show the situation of tract No. 1028. *Allan Dunn*, on his cross-examination, swore, that *Smith* lived on the land, as tenant of *Martin*, which was favourable to the plaintiff, because, if he was the tenant of *Martin*, he did not claim the tract as No. 1028, and therefore the record was not rebutting evidence. There was no necessity to explain the motive for taking a lease from *Martin*.

2. The declarations of *Herrington* were not evidence. They were made long after his sale to *Moore*, and therefore could not affect him, as claiming under him. And, as to these declarations being made in the presence of *Moore*, it does not appear that they were addressed to him, or even that he heard them, or that he could, without impropriety, enter into any dispute on the subject. There was a jury of view on the ground, and the dispute was between *Herrington* and *Bowman* and *Thompson*, in relation to a matter in which *Moore* had no concern, and no right to interfere. There is nothing in *Herrington* being at the time part owner of the tract in dispute, because they held in severalty, and not in common.

Bankes and *Baldwin*, for the defendant in error.

1. We offered the record of *Martin v. Smith*, to rebut the force of *Dunn's* testimony, and to show that although *Smith* was living on the tract as the tenant of *Martin*, yet he took that lease to avoid being turned off after the recovery against him, and that he was not then claiming the land as the lot No. 1028. 3 Serg. & Rawle, 278, 311, 314.

2. *Herrington's* declarations were evidence, having been made in the year 1807, when *Moore* and *Herrington* were joint owners of No. 1028. Besides, *Moore* was present, and, if he did not contradict these declarations, they were evidence against him.

The opinion of the court was delivered by

DUNCAN, J. The defendant in error, the plaintiff below, made out a clear title to No. 1028, in the Fifth Donation District, and the question was as to its locality. The cause was complicated by a mass of evidence, and has been perplexed by the course of the argument; but when the matters excepted to are reduced to

(Moore v. Smith.)

their simple elements, it presents two questions for examination, on the admissibility of evidence, neither of them attended with difficulty. The first, the admission of the record of an ejectment and judgment by one *Martin*, against this *John Smith*, and the recovery of another tract of land on which *Smith* lived, and claimed as lot No. 1028. The paper book does not state the order of the evidence with accuracy, nor the state of the cause on trial when the evidence was received; a matter frequently of importance in judging of the propriety of admitting or rejecting evidence, and, in this case, is the point on which the exception depended. By the paper book it would appear, that *Smith*, after giving in evidence his title to No. 1028, and having produced several witnesses, the object of whose testimony was to establish, that the tract in possession of *Moore* was No. 1028, offered the record of the ejectment. But this record shows, that when that record was first offered as evidence in chief, it was rejected, and then properly rejected by the court. But on the cross-examination afterwards of *Allan Dunn*, one of the plaintiff's witnesses, evidence was given by him of *Smith's* residence on the land, which *Martin* recovered from him, and that he continued in possession, claiming that tract as No. 1028; and the witness testified, that, as far as he knew, he had lived there ever since. Then he understood he was the tenant of *Martin*. This was evidence for some purpose; and that purpose was sufficiently stated by the plaintiff below. It had been rejected as evidence in chief, but the defendant, in his cross-examination of *Dunn*, rendered it proper to explain what had become of his possession of *Martin's* tract; that he had by mistake seated himself on it, as No. 1028, which, on the trial of *Martin's* ejectment, it turned out not to be, and that *Martin's* having established his right to it, and shown the mistake of *Smith*, and recovered it by due course of law; for had not this been explained, and it could be explained in no other way than this, it would have been open to argument, and the cross-examination, as to this fact, was with that view; that *Smith* still held the possession under the same right that he sets up against *Moore*. Indeed the argument of the plaintiff in error admits this. The objection is not that it was not evidence for any purpose, but that it was not stated, and does not appear for what purpose it was offered. Now, it is plainly and explicitly stated. No one who examines the record can doubt, that it was not offered as evidence of title, but to explain a matter which *Dunn* had stated on his cross-examination by the plaintiff in error, and coming out in the cross-examination as new matter. It was the evidence of the plaintiff in error, and therefore it became necessary for *Smith* to give the whole history of that possession and of its recovery by him. This is very like the case of *Stewart v. Richardson*, 4 Binn. 198. There, the conveyance was not evidence of title, but it tended to confirm the evidence of a witness whose credit had been severely impeached.

(Moore v. Smith.)

It was offered generally, without stating for what purpose or what was intended by it. There it was decided, that it was not necessary that the object and design of the evidence should be stated by the party offering it, unless it is required by the opposite party. If the object is neither stated nor required to be stated by the party, and the evidence is rejected generally, its admissibility for any purpose is sufficient to impugn the decision of the court. If this evidence had been offered to prove a particular right, it was not evidence of that right, and the court reject it as not being evidence of that right,—not evidence for that purpose, though it might be evidence for another purpose. Then, according to this principle, which has been followed up by a series of decisions in this court, and by other courts in the *United States*, it would have been properly rejected, and for the best reason, if it was offered for a purpose expressed, and to prove a particular right or fact, and it is rejected as evidence of that, and the party conceives it is evidence for any other purpose, he may, after this rejection, offer it for that other purpose; for, if this was not the law, the judgments of courts of Common Pleas might be reversed for errors never committed by them, and a party have his judgment reversed on a ground which he never did take and never would have taken. The judgment in *Hassinger v. Spayd*, decided lately at *Sunbury*, was affirmed on these principles. There, the papers offered and rejected were no evidence for the purpose for which they offered, though they were evidence for another purpose, and even evidence of title; and it was held, they were properly rejected by the court. It is as clear as light, that it was offered for a particular purpose. As general evidence, it had been before rejected. The renewal of the offer immediately after *Dunn's* examination; the nature of the evidence given by him, and the admission of the defendant, that on the trial *Smith* defended claiming under the patent for lot No. 1028, and the restricted admission of it by the court; the qualification of the court when it was received as evidence for some purpose; the court saying, they would state to the jury the purpose for which it was received, all prove this. The plaintiff in error has failed in supporting his exception to this evidence.

The second bill of exceptions respects the admission of the declarations and conversation of *James Herrington*. This decision of the Court of Common Pleas is attempted to be maintained on two grounds: First, that *Moore* and *Herrington* were joint owners when these conversations took place; and, secondly, that they were in the presence of *Moore*. Of all evidence, loose, hasty conversation is entitled to the least weight. I do not know, that, in the present case, the conversation could have weighed more than a feather. Yet it might have made some impression on the jury, and it ought not to have been received. So far as any judgment can be formed of the state in which *Moore* stood with *Herrington* at that time, from the evidence it would appear that *Moore*

(Moore v. Smith.)

had bought this part of the land from *Herrington*. It was his exclusive possession of the part sold to him by *Herrington*. They were neither joint tenants, nor tenants in common. Whatever right *Moore* had, was a several right, in which *Herrington* had no interest or concern. After *Herrington* parted with his title, no conversation he might hold, to suit some other particular purpose, or answer one view in a dispute with others, could affect *Moore*. But it is said, *Moore* was along as a chain carrier, on a view in the case between *Herrington* and *Thompson* and *Bowman*. In this controversy *Moore* had no interest. It was not a conversation held with him or a declaration made to him. There is no evidence that he stood so near the parties who held the conversation, that he must of necessity have heard it. He was employed in a business which required all his attention. The reason why this species of evidence is given, is because the party by his silence is supposed to acquiesce. *Qui tacet, consentire videtur*. That presupposes a declaration or proposition made to him, which he is bound either to deny or to admit. A man carrying a chain to ascertain some boundary, with which he has no concern, cannot be presumed to attend to all the rough and boisterous talk between two impetuous litigants. Nor is he to throw himself into the dispute, by contradicting either of the parties on such an occasion. It might be deemed impertinence in him to contradict them, unless some appeal was made to him. But there was no proof that he either did or could hear these conversations. The only evidence is, that he was present at the view; that he was on the land, the tract; and he was acting as a chain carrier. This is quite too loose. Two men, at this rate, might talk a third out of his whole estate, with a witness! Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction; some assertion made to the man, with respect to his right, which, by his silence, he acquiesces in. The judgment is, for this reason, reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 19, 1826.]

JOHNSTON *against* HUMPHREYS, Administrator of
PORTER.

IN ERROR.

If money be received as a deposit for a special purpose, and the party who receives it, instead of applying it to that purpose, uses it, he cannot set up the act of limitations as a bar to a recovery by the party entitled to it.

ON a writ of error to the Court of Common Pleas of *Westmoreland* county, it appeared that this was an action on the case, brought by the defendant in error, *Thomas Humphreys*, administrator of *Charles Porter*, deceased, against *Alexander Johnston*, for money had and received by the latter for the use of the former, under the following circumstances:—

Charles Porter purchased from *John Craig* a tract of land, and paid him the first instalment. *Porter* died in *Philadelphia*, on his way to *Ireland*, and, there being no person in this country to complete the purchase, the amount of the first instalment was paid over to *Thomas Humphreys*, the brother of *Elizabeth Porter*, the wife of *Charles Porter*. The money was deposited in the hands of *James Irwin*, who, having used it, gave his bond for three hundred and fifty-one dollars and eighty cents, in the name of *Elizabeth Porter*. *Thomas Humphreys*, having collected the money from *James Irwin*, the attorney, by his direction, and in consequence of letters from *Ireland*, paid it over to *Alexander Johnston*, to be transmitted by him to *Ireland*. *Johnston* wrote the bond, from *Irwin* to *Elizabeth Porter*, and knew all about the transaction. The money not being transmitted, according to the understanding of the parties, *Thomas Humphreys* took out letters of administration, on the 8th of *September*, 1819, on the estate of *Charles Porter*, and brought this suit to *August Term*, 1821. After the letters of administration were granted, *Humphreys* claimed the money from *Johnston*, who said he was making arrangements to send it to *Ireland*.

The defendant relied upon the act of limitations, more than six years having elapsed from the receipt of the money, until the commencement of the suit. The court below was of opinion that the act of limitations did not prevent the plaintiff from recovering, in the case before it, and the plaintiff excepted to its opinion.

Alexander, for the plaintiff in error, said, that the money belonged to *Elizabeth Porter*, because the bond for it was given to her, and it was recovered at law, and paid to the defendant below as her agent. But, admitting it was received for the personal representative of *Charles Porter*, the defendant below having become a trustee against his will, the trust was not of such a charac-

(Johnston v. Humphreys, Administrator of Porter.)

ter as would prevent the operation of the act of limitations. 1 *Wheat*. 177. *Witherup v. Hill*, 9 *Serg. & Rawle*, 12.

Foster, for the defendant in error, answered, that the widow of *Charles Porter* had no right to the money, except in trust for the personal representatives of her late husband, and when the amount of the bond was recovered it belonged to his estate, which entitled the plaintiff to recover it. The evidence showed that the defendant below knew all the circumstances of the case, and, consequently, that it belonged to the estate of *Charles Porter*. He was therefore a voluntary trustee, and cannot set up the act of limitations against the trust. Besides, there was a demand of the money after letters of administration were taken out, and an acknowledgment of the debt, by a declaration, on the part of the defendant, that he was making arrangements to remit the money to *Ireland*.

The opinion of the court was delivered by

ROGERS, J. It has been ruled by the Chancellor of *New York*, (3 *Johns. Ch. R.* 190,) that no lapse of time is a bar to a direct trust, between the trustee and *cestui que trust*. Upon this principle, it has been decided that an administrator, being a trustee, cannot set up the act of limitations in bar of the next of kin, or person entitled to the distribution of the assets. The distinction is between a direct or express trust, and those cases where a person comes into possession in his own right, and is afterwards, by matter of evidence, or construction, changed into a trustee. The same Chancellor has also ruled, (in 7 *Johns. Ch. R.* 90,) that, as long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute of limitations does not apply. The application of these principles to the facts of the cause, will decide the question raised, on the defendant's plea of the act of limitation. The money was not paid over to *Johnston*, nor received by him with the view of being used by him; but it was a deposit made for a particular and special purpose, on the express trust and understanding of all the parties, that he would transmit the money to *Ireland*, for the benefit, as I understand it, of the legal representatives of *Charles Porter*, who alone were entitled to receive it. There was a special confidence reposed in him, and, upon the receipt of the money, he becomes a trustee for the benefit of those who were legally entitled to the money. If this case be embraced within the act, when, it may be asked, does the statute begin to run? Surely not from the receipt of the money, but from the time there was some person in this country who had a right to demand payment, which was not until the 8th of *September*, 1819, when letters of administration were granted to *Thomas Humphreys*, and less than six years before the commencement of the suit. The case in 7 *Johns. Ch. R.* 90, establishes the principle, that it must cease to be a continuing and subsisting trust, otherwise the remedy is not barred by lapse of time. In

(Johnson v. Humphreys, Administrator of Porter.)

order that the statute of limitations may begin to run in the case of a trust, there must be an adverse holding of the money, of which I should presume those who are interested should have notice. In the case under consideration there was no adverse holding. It was in the beginning an express trust. It remained a continued and subsisting one. It is a part of this case, that when a demand was made by the administrator, *Johnston* acknowledged the debt, and said he was making arrangements to send the money to *Ireland*. This conversation took place after the 8th of *September*, 1819, when the letters of administration were granted. The suit was brought to *August* Term, 1821. I do not, however, put the cause upon this acknowledgment, as taking it out of the statute of limitations; but I consider the acknowledgment as plainly implying that *Johnson* himself viewed it as a continuing and subsisting trust, which brings it within the principle of the case of *Thum v. Bloodgood*, 7 *Johns. Ch. R.* 90.

Judgment affirmed.

 [PITTSBURG, SEPTEMBER 26, 1826.]

Case of M'GREW'S Appeal.

The settlement and confirmation of a partial administration account, do not preclude the court, on the settlement of a supplementary account, from inquiring into errors in the first account; particularly where minors are interested in the estate, who had no guardians when the first account was settled.

APPEAL by *James M'Grew*, guardian of the minor children of *George Lose, jr.*, deceased, from a decree of the Orphans' Court of *Westmoreland* county, on the settlement of the account of *George Lose* and *Henry Geiger*, administrators of the estate of *George Lose, jr.*, deceased.

After argument, by *Foster* for the appellant, and *Coulter*, for the appellees,—

The opinion of the court was delivered by

HUSTON, J. This is an appeal from a decree of the Orphans' Court of *Westmoreland* county.

The administrators had filed an account, which was confirmed in *August*, 1821, by which a balance appeared due to the administrators of one hundred and ninety-four dollars and thirty-six cents. On the 20th of *August*, 1824, they presented for settlement a supplementary account of their administration, in which the balance appearing on their former settlement was introduced as an item in their favour. To this last account the guardians filed objections, and also objections to several items of the former account. The court refused to examine the items of the first ac-

(Case of M'Grew's Appeal.)

count, and confirmed the second as presented. At the settlement of the account, in 1821, the children of *George Lose*, deceased, were of tender age, and had no guardians. The present account showed that the former was not a final account.

The act of the 8th of *February*, 1819, (*Purd. Dig.* 618, 7 *Penn. Laws*, by *Reed*, 151,) is in these words: "When the accounts of guardians, executors, or administrators, *shall be finally settled, according to law*, and the same confirmed by the court, no appeal shall lie therefrom, unless the same shall be entered within one year after confirmation."

A partial account is not so easily understood. Objections to it are put aside, by a suggestion that all will be explained hereafter. It is not so easily scrutinized as one in which the whole transactions of the accomptant appear. And the words, finally settled, cannot be fairly applied to any other than a final account.

I do not see how any account can be settled *according to law*, where minors are interested, and those minors have no guardians appointed to attend to their interests. Where a petition is presented to the Orphans' Court for a partition or valuation of an intestate's estate, and infants have an interest, guardians are always appointed, or the inquisition will not be received by the court. The final settlement of those who administer the personal estate, is of too much importance to be passed over without notice to those interested, and examination by them. There can be neither notice to, nor examination by a minor. Guardians must be appointed to receive notice on the part of infants, or the account will not be *settled according to law*.

The first and principal objection to this account, was to an item of three hundred dollars cash lent, by *George Lose*, the administrator, to his son, the deceased, in his lifetime; of which, it was alleged, there was not sufficient evidence. This court is of opinion the proof here offered is sufficient; the oath of the father-in-law, *George Lose*, jr., is clear and positive: this objection is therefore overruled.

The second objection is not supported by proof; nay, it is disproved: it is proved the guardians received the rent of 1824, which is attempted to be charged to the administrators.

The third and fourth exceptions were scarcely mentioned in this court, and no evidence offered relative to them. But there is positive proof that one of the administrators admitted that one hundred dollars had been received from Mr. *M'Kever*, which is not charged to them in their account. This was not a loose conversation, but a serious solemn declaration repeated. There must then be a charge against them for this sum.

It is also admitted, that a mistake has been made in the amount of the sum charged against the estate. This must be corrected. These two items will reduce the amount due the accomptants to one hundred and forty-six dollars and eighty-four cents.

[PITTSBURG, SEPTEMBER 19, 1826.]

The COMMONWEALTH and MECHLIN, *qui tam*, &c.
against WILLIS.

IN ERROR.

A hawker and pedlar, who goes from house to house in an incorporated or county town, offering for sale goods prohibited by the act of the 28th of March, 1799, and sells any one article, even of trifling value, incurs the penalty of fifty dollars, imposed by that act. And a license obtained under the act of the 4th of March, 1824, does not protect him.

ON the return of a writ of error to the Court of Common Pleas of *Armstrong* county, the question raised upon the record was argued by

Kelly and *Baldwin*, for the plaintiffs in error, and by
Blair, for the defendant in error.

Every thing connected with the point decided, is stated in the opinion of the court, which was delivered by

HUSTON, J. This suit was brought to recover from *John Willis*, who had a license as a hawker and pedlar, the penalty of fifty dollars, incurred, as was alleged, for vending and exposing to sale foreign goods in *Kittaning*, an incorporated and county town. See *Act of the 30th of March, 1784*, 2 Sm. L. 99, and *Act of the 28th of March, 1799*, 3 Sm. L. 359, *Purd. Dig.* 637, (*last edition*,) the third section of which enacts, that no person licensed for the purpose aforesaid, shall be permitted to vend or expose to sale any foreign goods, &c., in any private or public house, or any of the open streets, lanes, or alleys, or in any other part or place of the city of *Philadelphia*, or any of the corporate or county towns of this state, under the penalty of fifty dollars, &c.

The facts, that *John Willis*, the defendant, arrived on the 25th of *February*, 1825, at the house of *John Mechlin*, in *Kittaning*, a corporate and county town, and opened and exposed his goods for sale, and sold foreign goods to sundry persons; and that he carried parcels of his goods to the houses of sundry persons in the said town, and there offered them for sale; and sold them, or parts of them,—in particular one card, containing a dozen strings of beads, of foreign manufacture, to Mr. *Sloan*, and another to Mr. *Caldwell*, were fully proved, and not denied. His license, as a pedlar, was also produced.

The defendant produced a license from the treasurer of the county to retail foreign merchandise, under the act of the 4th of *March*, 1824, *Purd. Dig.* (*last edition*,) 527. This act only authorizes the person licensed to sell goods at one place in the county. The court told the jury, that this act protected him in opening his goods and selling them in *Mechlin's* room, and that the selling of a string of beads at Mr. *Sloan's* house to Mr. *Sloan*,

(The Commonwealth and Mechlin, *qui tam*, &c. v. Willis.)

and another at Mr. *Caldwell's*, to Mr. *Caldwell*, were of too slight a nature to incur the forfeiture.

The license from the governor to him, as a hawker and pedlar, is one thing,—as that contains a prohibition to sell in corporate and county towns,—and, as he did so sell, he incurred the penalty under this act. Whether the license from the treasurer will protect a licensed pedlar, who continues to act as such, in opening his goods for sale in a corporate or county town, if he neither sells nor offers to sell in any other place within that county, is a question not submitted to us, and which we do not decide. In the present instance, he came with his goods, in a wagon, stood only three days, and then travelled on; and, during those three days, not only offered all his goods for sale, and sold parcels to different persons at *Mechlin's* room, but he carried parcels of his goods into the houses of divers citizens of the borough, and there offered them for sale, and actually sold, in different places and to different persons, *two cards of beads*.

The offence prohibited, is vending or exposing to sale foreign goods. The law does not confine the offence to goods of any precise value or amount. The courts have no power to limit, where the law does not. Whenever a pedlar offers divers goods contrary to law, and sells any one article, he incurs the penalty. The act of 1824, and the license under it to sell in one place, do not protect a pedlar who carries his goods from house to house.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 19, 1826.]

KERR and another *against* SHARP.

IN ERROR.

If, on a distress for rent, the goods distrained upon are sold without having been appraised and advertised, agreeably to the act of the 21st of *March, 1772*, the distrainer is a trespasser *ab initio*, and an action of trespass *quare clausum fregit* may be maintained against him.

In trespass *quare clausum fregit*, the omission to declare that the defendant *unlawfully* broke the plaintiff's close, &c. is cured by verdict.

In considering the charge of the court below, a detached part of it is not to be taken, without reference to other parts, and to the facts proved in the cause; and if, from the *whole* charge, it appear that the court instructed the jury rightly in point of law, the judgment will not be reversed, even if the court below was mistaken in its opinion as to the facts.

Nicholas Sharp, the defendant in error, brought this action of trespass *quare clausum fregerunt*, in the Court of Common Pleas of *Westmoreland* county, against the plaintiffs in error, *David Kerr* and *Alexander Foster*, and, in his first count, declared that

(Kerr and another v. Sharp.)

the defendants below broke and entered his close; "And then and there did seize, take, and distrain the wheat and rye of the said *Nicholas*, there growing," &c., "and then and there impounded the said wheat and rye," &c.

The second count of the declaration charged the defendants below with cutting down, seizing, and carrying away the wheat and rye, and breaking the close of the plaintiff below.

On the trial, the plaintiff below gave in evidence a lease of a tract of land, made to him by *David Kerr*, on the 25th of *October*, 1814, for seven years from the 1st of *April* 1815, for sixty dollars *per annum*. He also proved, that *Kerr* and himself entered an amicable action before a justice of the peace, in which *Kerr* claimed two years' rent. The matter was referred to arbitrators, who, on the 4th of *May*, 1822, reported a balance of twelve dollars due to *Kerr*. It was proved, by the justice, that the parties came to his house to enter the action, and said it was for the rent of two years, which remained unsettled. After the judgment was entered, the justice asked *Kerr*, if he would give *Sharp* some time? He said, "he would think about it," or "see about it; that he had a landlord's warrant, which he could use or take the judgment." The justice had written the landlord's warrant referred to, which was directed to *Foster*, one of the defendants below, who was a constable. *Foster* afterwards proceeded on the warrant, distrained upon the wheat and rye of the plaintiff below, and sold it. The grain was appraised on the day of sale, at the request of *Foster*, and, on the same day, an advertisement was put upon the door of the house; and it was proved that *Foster* had said, that the grain had not been appraised or advertised before that time.

The President of the Court of Common Pleas, after stating the nature of the action and the pleadings, gave to the jury the following

CHARGE. The entry, the taking and distraining of certain quantities of wheat and rye, and the fact of afterwards selling six acres of the rye, which were, at the subsequent harvest, reaped and carried away by the purchaser, at the sale, have been fully established. The defendants have endeavoured to justify these proceedings, under an alleged warrant by the one to the other for twelve dollars of rent due by the plaintiff. It is pretty clear, that this rent was then due. Although the defendant, *Kerr*, had recovered a judgment for it, his remedy by distress was not thereby divested, unless you can conclude, from his not having objected to the justices taking special bail, that he virtually relinquished that remedy. You ought to be cautious in forming this conclusion, as it appears that when asked by the justice whether he was agreed, the answer was, that he would think of it, which rebuts the presumption of acquiescence.

The warrant has not been produced, and, it is alleged, has been

(Kerr and another v. Sharp.)

lost, and cannot, although search has been made, be found. Several persons have been examined on this point, and there could be little if any difficulty respecting it, if *Alexander Foster*, one of the defendants, had come forward and testified to the fact of the loss of the warrant, and to his having used proper diligence to find it, as the other defendant has done. A doubt hence arises, whether the alleged warrant may not be in *Foster's* hands, and if he had attended the referees, before whom this paper was laid, I would consider the testimony which has been given by Mr. *Johnston* and others as not to be depended on. If you are satisfied of the existence of the warrant, its loss, and that due diligence has been used to procure it without success, the great question for your consideration will be, whether the defendants were justifiable in proceeding to sell the rye and wheat, without having pursued the provisions of the law, required in cases of this kind. It requires a warrant from the landholder,—a distress by the proper officer,—a notice of this to the tenant,—an appraisement by two reputable freeholders, on oath, and after this, six days' notice of the sale. There is no testimony whatever of the defendant's having complied with any of these wholesome provisions. The subsequent sale, therefore, of the rye was a tortious act, and vitiates the whole proceedings. It constitutes the defendants trespassers from the beginning, and, although an action on the case might have been supported, it is not the only remedy. The plaintiff is therefore entitled to recover. This being an action at common law, the damages will be according to the injury suffered by the plaintiff. These may be not only compensatory, but you may go further, and, if you be persuaded the defendants acted not only illegally, but oppressively, you ought to give more."

To this charge, the defendants' counsel excepted.

Alexander, for the plaintiffs in error, contended, 1. That the opinion of the court below, that an action of trespass would lie upon the facts proved in this case, was erroneous. Admitting that no appraisement was made or notice given, agreeably to the act of the 21st of *March*, 1772, *Purd. Dig.* 708, the proper form of action was case, and not trespass *vi et armis*. The omission to do a thing does not make a trespasser *ab initio*; there must be some positive act done. 3 *Bl. Com.* 15. 1 *Vent.* 36, 37. 1 *Roll. Ab.* 673. *Bradley on Dist.* 266. *Woodfall's Landlord and Tenant*, 320, 322, 516. The statute 11 *G. 2, c. 19*, cures irregularities in distresses for rent; and some parts of this statute have by practice been extended to *Pennsylvania*. *Woglam v. Cowperthwaite*, 2 *Dall.* 68.

1. The first count of the declaration sets forth no cause of action. It only avers, that the defendant below distrained, &c., and not that he *unlawfully* distrained; and the judgment being general, it is erroneous.

(Kerr and another v. Sharp.)

2. The judge instructed the jury, that there must be a warrant given by the landlord, and a distress by the proper officer; and that there was no testimony whatever of the defendants' having complied with any one of these wholesome provisions. This was a mistaken opinion. The landlord may distrain himself, or do it through an agent. A warrant was not necessary; and, if it was, evidence was given of the existence of a warrant. *Bradley on Dist.* 216. 3 *Vin. Ab. Bailiff, B. pl.* 3, 4, 5. *p.* 537. 4 *Vin. Ab.* 1, *pl.* 5, 6.

Coulter, for the defendant in error, said, 1. That the principal question was, whether or not the statute of 11 *G. 2, c.* 19, extended to *Pennsylvania*; and he contended, that it did not. Our act of assembly, he observed, was passed soon after that statute, and had an eye to it. One of the provisions of that statute respected the curing of irregularities in conducting a distress, so as to prevent the distrainer from being a trespasser *ab initio*. 3 *Bl. Com.* 14. *H. Bl.* 37. But these provisions were not contained in the fourteenth and fifteenth sections, which alone, according to the report of the judges, had been extended here.

2. The omission to state that the distress was *illegal*, is cured by verdict. It must be presumed to have been illegal.

3. Taking the whole charge together, it may be supported. It appears, upon the whole, that the plaintiff was entitled to recover.

The opinion of the court was delivered by

ROGERS, J. Three errors have been assigned on this record:—

1. That case, and not trespass, was the proper action on the facts proved.

2. That there was no cause of action stated in the first count of the plaintiff's declaration. And,

3. In instructing the jury, that there must be a warrant by the landholder, and a distress by the proper officer; and in telling them there was no testimony whatever of the defendant's having complied with any one of these wholesome provisions.

The material facts are, that *Nicholas Sharp*, the defendant in error, was indebted to *Daniel Kerr*, for rent, in the sum of twelve dollars: That, on the non-payment of the rent, *Sharp* gave a warrant of distress to *Alexander Foster*, who distrained grain on the premises, without having the grain either advertised or appraised. It is provided, in the act of the 21st of *March, 1772*, that unless goods distrained be replevied, within five days, they shall be appraised by two freeholders, on oath or affirmation, and that, after the appraisement, six days' notice shall be given; and that, in such case, he may *lawfully* sell the goods and chattels, for the best price that may be gotten for the same. The law seems to be imperative, that before a sale can be *lawfully* made, these wholesome provisions of the act must be complied with.

Any irregularity in taking a distress, makes the landlord, at

(Kerr and another v. Sharp.)

common law, a trespasser *ab initio*. *Com. Law of Landlord and Tenant*, 491. 3 *Bl. Com.* 16, and the authorities there cited. Whenever the law gives one man the right to enter on the premises of another, as in case of a distress, or entry into an inn, then any act, which in itself is a trespass, makes the party a trespasser *ab initio*. It is otherwise, when he enters by permission of the party himself. The act of assembly says, that the landlord cannot lawfully sell, unless these requisites of the act be complied with. Selling the grain, without having it appraised, or any notice being given of the sale, was a trespass of an aggravated kind, for which an action will lie. The law makes the entry of the landlord, and his bailiff, unlawful from the beginning, for which the action of trespass *quare clausum fregit* is the proper remedy. For the purpose of removing the inconvenience to landlords, in *England*, the act of parliament of the 11 *Geo.* 2, c. 19, was passed. If the nineteenth section of that act be extended to *Pennsylvania*, there is an end of the question. It would appear, from the report of the judges, that two sections only, the fourteenth and fifteenth, have been extended. The extension of the nineteenth section must have been directly and immediately under consideration; and, in such a case, I consider this court bound by the report. Indeed, I do not conceive how they could have reported otherwise, as it is apparent that the legislature, in passing the act of the 21st of *March*, 1772, had before them the act of parliament of the 11th *Geo.* 2., and would appear to have excluded the nineteenth section, from a consideration of the different circumstances of the two countries. It is contrary to the policy of *Pennsylvania*, to favour landlords at the expense of the tenants.

It is with great reluctance, that after a trial of the merits I can listen to a mere technical objection. The plaintiff, in the first count in the declaration, charges the defendants, that they broke and entered his close, and then and there did seize, take, and distrain the wheat and rye of the said *Nicholas*, there growing, &c. The *gravamen* of the action, is the breaking and entering the close of the plaintiff; and although it is not denied, that they unlawfully did seize, take, and distrain the wheat and rye, yet, after verdict, we must suppose, that the illegality of the seizure, was proved to the satisfaction of the court and jury.

The declaration is informally drawn, and the objection here made would have been sustained on special demurrer. Had the defendants so proceeded, the omission would have been perceived, for it was merely the omission of the word *unlawfully*, and then the plaintiff would have had leave to amend. No injustice would have been done. By assigning it for error, we are called upon to put the plaintiff out of court; for, should we sustain the objection, we have no power to award a *venire*.

I have carefully reviewed the charge of the Court of Common Pleas, in relation to the third error assigned. It would be treat-

(Kerr and another v. Sharp.)

ing the Courts of Common Pleas and their suitors with great unfairness, if we should take a detached sentence, without reference to other parts of the charge, and the testimony in the cause. I understand the court merely to say, that the distress, in this case, must be made by the authority of the landlord; and that, as *Foster* acted as bailiff, he should have a warrant from him, either written or parol.

In conclusion, I have barely to observe, that even if the court were mistaken in their opinion on the facts, it cannot avail the plaintiffs in error, as has been repeatedly held by this court.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 19, 1826.]

BARRINGTON and others *against* The BANK of
WASHINGTON.

IN ERROR.

Where the presiding judge of a Court of Common Pleas regularly certifies a case for trial to a special court, on the ground of an alleged interest in himself, and the parties go on to trial without objection to the jurisdiction, this court will not, in a doubtful case, sustain an exception to the jurisdiction of the special court, though it appear from the certificate of the judge, that in his own opinion he had no interest, and though this court should be of opinion that he was not disqualified, on account of interest, from being a witness in the cause.

If, in an action on a bond with a condition, the defendant plead *non est factum* and performance of the condition, and, on the eve of trial, receive from the plaintiff, instead of a regular assignment of breaches, an informal specification of them, and go on to trial on the merits, this amounts to an agreement of the parties to waive irregularities in the pleadings; and, consequently, this court will not reverse the judgment, because the cause was tried without having been regularly put to issue.

The sureties in the official bond of a cashier of a bank, created under the act of assembly of 1814, the condition of which bond is, "that he shall well and truly perform the duties of cashier, to the best of his abilities," not only undertake for the fidelity and honesty of the principal, but also that he shall perform the office with competent skill and ability; and if he transcends the known powers of a cashier, by changing the securities of the bank without their knowledge, and loss has accrued by the abuse of his trust, the sureties are answerable for the loss.

But, in such a case, the measure of damages is, not the amount of the debt lost, but the amount which might have been recovered, if the securities had remained unchanged; and this should be submitted to the jury upon the evidence.

If no evidence be given of a written appointment of a cashier, evidence is admissible to show, that the person alleged to be cashier, acted as such in the various duties of that office; and though a resolution of the board of directors, directing the cashier to require certain monies to be paid to him, at the banking house, on or before a certain day, is not evidence *per se*, yet, connected with other testimony, it is evidence of his appointment.

Query, whether, if a bank has forfeited its charter, and is unable from the funds paid in to satisfy its debts, an *original subscriber*, who has transferred his stock, is a competent witness, for the bank, to increase its funds? An *assignee* of bank stock is no further liable than as a stockholder.

The entry in the book of minutes of a resolution of a certain number of directors, but not a competent number to make a board, that the name of one of the obligors in the cashier's official bond be struck out, provided the others agree thereto, is not evidence to show the consent of the other obligors to the alteration of the bond; but it is evidence to show that the bank was then in possession of the bond unaltered, and that the other obligors had not then consented to the alteration.

Where a bond contains an erasure, it is for the jury to decide, upon the evidence, whether it is the identical contract declared on or not. But the law views the alteration of such an instrument with a jealous eye, and requires satisfactory evidence to be given by the obligee that the alteration, if in a material part, was made without his consent; or, if with his consent, that the consent of all the parties in interest was also given.

Where the obligee makes it a part of his case that the bond was in his possession, with the names of all the obligors to it, and afterwards brings suit upon it, omitting one of the obligors, whose name appears to have been erased from the bond, it is an admission that the alteration was made with his consent; and it lies upon him to show that it was made with the consent of all the other parties in interest.

(Barrington and others v. The Bank of Washington.)

THE record of this case being returned on a writ of error to the Court of Common Pleas of *Fayette* county, accompanied by several bills of exceptions, it appeared that The Bank of *Washington*, the defendants in error, brought an action of debt against the plaintiffs in error, *John Barrington*, *Daniel Moore*, and *John Hughes*, surviving obligors of *Thomas Acheson*, upon a bond in the penal sum of thirty thousand dollars, conditioned that the said *John Barrington* should "well and truly perform the duties of cashier of the bank, to the best of his abilities." The defendants pleaded, *non est factum* and performance of the conditions of the bond; and the plaintiffs assigned breaches, by filing a paper containing thirty-four specifications of charges against the said *Barrington*, in his official character. There was no replication to the plea of *non est factum*, nor any rejoinder to the plaintiffs' assignment of breaches.

The cause was tried at a special court, held by his Honour Judge SHALER, in consequence of the following certificate of his Honour Judge BAIRD:—

"I have been requested by the counsel of the plaintiffs to certify this cause for trial, at a special court, on the ground, that although I may have no direct interest in the issue, yet they conceive I have, in the questions of law to be determined in the case.

"An extract has also been furnished from the specification of claim, referring me to certain items, in order to sustain the suggestion made. I have carefully examined them, and cannot see in what way I can be considered as interested in any question that can arise concerning them in that case. With respect to the item which is marked No. 13, the transfer was made with the consent of the directors, in order to close my concern with the bank. But, if it was not *legally* made, which I am willing shall be inquired into, the stock is still mine. I have already offered to submit that question to decision in any way the bank may wish, and will myself abide the result. I can never consent, that the cashier or his sureties, shall be involved on account of any transactions of the bank with me. Some time ago I proposed to Mr. *Brady*, the attorney who spoke to me on the subject, that I was ready at any time to come to any adjustment with the bank on that point; and if they could show that the stock was not worth its nominal amount at the time of the transfer, I would make up the deficiency; or if it should turn out that the transfer is invalid, I will retain the stock, and pay the balance of my account. As to item No. 15, I know not what it means. My whole stock was one thousand three hundred and sixty-five dollars, and yet there appears also a charge of nine hundred and ten dollars against the cashier. It must be a mistake, as *that* stock was included in the other credit. As to the suggestion, that this stock was the property of other persons, I can at any time show, that it is unfound-

(Barrington and others v. The Bank of Washington.)

ed. I have the receipts for all the instalments paid by myself. It has been shown to Mr. *Evans*, who handed the papers to me.

“With respect to all the other items, I can only say, that I know nothing about them. The date of all the transactions is subsequent to the time when I left the bank, and ceased to take any interest in its concerns. I certify, however, that I have a controversy pending with The Bank of *Washington*, arising out of a contract made *with the directors*. How far my interest, in that case, can have any relation to acts of the cashier, done *without* the authority of the board, I cannot at present see. I have no doubt, however, that, in the view of the managers of the bank and their counsel, questions may arise affecting me in some way; and I am therefore induced to certify the case to his Honour Judge *SHALER*, President of the Fifth Judicial District of this state, for trial, at a special court, as I am requested to do. And I also certify all facts really existing which may be necessary to give him jurisdiction of the case.

Thomas Baird.

“*Washington, Pa., July 26th, 1824.*”

The specifications, referred to in the judge’s certificate, were these:—

No. 13.—*July 28.*—He has credited the account of *Thomas H. Baird* this day with cash \$1365, whereas it appears by the entry, to be the amount of seventy-eight shares of stock, at par value, without the authority of the directors,

-	-	-	-	-	-	-	\$1365
Interest to Dec. 31st, 1822,	3.5.3,	-	-	-	-	-	280

No. 15.—*July 28.*—He has credited the stock account of *Thomas H. Baird*, with fifty-two shares of stock, the property of other persons, some of whom are deceased,

Interest to Dec. 31st, 1822	3.5.3,	-	-	-	186
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On the trial, one of the subscribing witnesses, after having proved that the bond was originally executed, not only by the defendants and *Thomas Acheson*, deceased, but by a certain *Robert Haslett* also, whose name had been erased before the commencement of the suit, was asked by the plaintiffs’ counsel, “who acted as cashier of The Bank of *Washington*?” The defendants’ counsel objected to the question being answered, alleging, that the minutes and proceedings of the Board of Directors in writing ought to be produced, to show the appointment, if any had been made. The court overruled the objection, and the defendants’ counsel excepted to their opinion. In answer to the question, the witness stated, that *John Barrington* acted as cashier of the bank, signed the notes, and continued to act in that character until the bank wound up its business. Notes of the Bank of *Washington* were produced, which were proved to have been signed by the said *John*

(Barrington and others v. The Bank of Washington.)

Barrington as cashier. The witness further stated, that he did not know to whom the bond was delivered; and that the name of *Robert Haslett* was not, when he last saw the bond, obliterated by having a pen drawn through it, as it was when he gave his testimony.

George Morgan, the next witness produced by the plaintiffs, after having stated that he was a director of The Bank of *Washington*, was asked by the plaintiffs' counsel, "if the Board had appointed *John Barrington* cashier?" To this question the counsel of the defendants objected. He was then asked, "if there was an appointment of the cashier made in writing?" To this he answered, that "there was: That he was secretary of the Board, and put the appointment of cashier in writing himself; and afterwards asked Mr. *Barrington* to leave a blank in the minute book, where he could insert, in his own handwriting, the appointment of cashier; but he never did it, and could not tell what had become of the minute in writing, which he made of the appointment. He had made no search for it, and it had escaped his recollection until he was asked about it on the trial." The witness was then asked again, "whether the Board had appointed *John Barrington* cashier?" The question was again objected to, and the court sustained the objection.

The plaintiffs then offered to read in evidence a resolution of the Board of Directors, dated *August 31st*, 1814, in the following words, viz. "On motion ordered, that the cashier be directed to require the commissioners to pay the monies of the bank in their hands to him, at the banking house, on or before *Wednesday* next." The evidence was objected to by the defendants' counsel, but admitted by the court, to whose opinion exception was taken.

The plaintiffs then offered, as a witness, Dr. *Samuel Murdoch*, who was objected to, on behalf of the defendants, on the ground that he was a stockholder; to prove which, the defendants produced the stock book. The plaintiffs then produced the transfer book, from which it appeared that he had, on the 3d of *February*, 1823, transferred a part of his stock to *Alexander Murdoch*, and the residue of it, on the 13th of *November* 1824; before the earliest of which periods, it appeared that the bank had forfeited its charter. It also appeared, that the nominal amount of each share of stock was fifty dollars; that only seventeen dollars and fifty cents had been paid on each share, transferred by Dr. *Murdoch*, and that the bank owed debts which it was unable to pay. The court having overruled an objection made by the defendants' counsel, to the admissibility of Dr. *Murdoch* as a witness, an exception was taken to their opinion.

Upon being sworn, Dr. *Murdoch* stated, that the endorsement on the paper, purporting to be the bond on which this action was brought, was in his handwriting; that he had received the paper

(Barrington and others v. The Bank of Washington.)

from *Thomas Brice*, who had been a director of the bank, but he could not recollect at what time.

Thomas H. Baird, being next offered as a witness on the part of the plaintiffs, was objected to on the ground of interest. It was admitted by the plaintiffs, that he had been a stockholder, but they alleged that he had transferred his stock. It appeared from the stock book that he had been a stockholder, but no transfer of his stock was to be found in the transfer book. There was, however, a letter of attorney in the following words, viz. "I assign and transfer and make over to The Bank of *Washington*, all the shares which I hold or have an interest in, in the bank, in whatsoever names they may be; and I do hereby authorize and empower *John Barrington*, Esq., to make this transfer on the books of the said bank, at any time, with as full effect as I could do myself. Witness my hand and seal, this 7th of *July*, 1819. *Thomas H. Baird.*"

"Attest, *Catherine Barrington.*"

The stock account of Judge *Baird* was likewise produced by the plaintiffs, and No. 13 of the plaintiffs' specification of breaches, stated above, was read by the defendants' counsel, in further support of their objection to his testimony. The court, however, admitted the witness, and sealed a bill of exceptions.

In giving his evidence, this witness declared that he could not recollect when he first saw the bond. He thought he saw it among the papers of the bank. He had no recollection of the execution of the bond, or that it had ever been offered to the Board. Whether or not it was taken in his absence, he could not tell. He found it lying in the bank, and he thought he put it into a blank book of his in the bank. Afterwards, when he left the bank, he handed it to some gentleman, but could not say to whom. He knew of no act of the Board, or of himself, to discharge *Robert Haslett*. The minutes were generally kept by *Barrington*. He had a conversation with *Barrington* on the subject of the erasure of the bond, when he came out of the last special court. The deponent told *Barrington*, that he must have made the erasure. He replied, that if he did, it must have been in the presence of the Board, and with their assent. The deponent told him he thought it was, for such was his impression.

The plaintiffs, for the purpose of showing the existence of a bond to which the name of *Robert Haslett* was signed, over which the Board of Directors had control, next offered to read a resolution on the minutes of the six following named directors, viz. *Thomas H. Baird*, President, *Thomas Acheson*, *R. Hamilton*, *D. Norris*, and *James Orr*, of the date of the 19th of *April*, 1815, in these words, viz. "Resolved, that the name of *Robert Haslett* be struck off the said bond of security for the cashier, provided the other sureties consent thereto." The evidence was objected to by the defendants' counsel, on the ground

(Barrington and others v. The Bank of Washington.)

that the resolution was entered into by a number of members of the Board, incompetent for that purpose. The court overruled the objection, and admitted the evidence, upon which an exception was taken.

The plaintiffs then offered to read in evidence to the jury, the bond of which proof had been made, as stated above, without further evidence, which was objected to by the defendants' counsel, who produced and read to the court the Fifth Fundamental Article of an act of assembly, entitled, "An act regulating banks," passed the 21st of *March*, 1814, and the following ordinances or by-laws of the said corporation, viz.—

"ARTICLE SECOND."

"SECT. I. The directors shall keep fair and regular entries in a book, to be provided for that purpose, of their proceedings; and, on every question where two directors shall require it, the yeas and nays of the directors voting, or the names of the members who make and second a motion, shall be duly inserted on the minutes, and these minutes shall at all times, on demand, be produced to the stockholders, when at a general meeting the same shall be required."

"SECT. VII. The minutes of the preceding meeting shall be read before the Board of Directors proceed to any business, and no debate shall then be admitted, nor question taken on the business of such meeting, except as to errors and inaccuracies."

The court overruled the objection, and permitted the bond to be given in evidence; upon which the defendants' counsel excepted to their opinion.

Among the charges of official misconduct contained in the plaintiffs' specification of breaches, was the following, viz.—

"No. 21.—*Aug. 18.*—*Joseph Pentecost's* debt due to the bank; he discharged the endorsers, and took insufficient security for the same, without the authority of the directors, - - - - - \$10,328,20.
Interest to *Dec. 31st*, 1822, 3.4.12, 2,088,07."

It appeared, that *Joseph Pentecost* was indebted to The Bank of *Washington* to the amount of ten thousand three hundred and twenty-eight dollars, and twenty cents, which was due upon three notes; one for one thousand dollars, endorsed by *George Baird*; one for four thousand two hundred and fifty dollars, endorsed by *George Morgan*; and one for five thousand six hundred dollars, endorsed by *James Brice* and *William Ashbrook*: That *Barrington*, the cashier had, on the day of *August*, 1819, taken the bond of *Joseph Pentecost*, conditioned for the payment of ten thousand three hundred and twenty-eight dollars, in annual instalments, from the date of the bond, which contained a warrant of attorney, authorizing the entry of judgment thereon, with a clause prohibiting judgment from being entered until default had

(Barrington and others v. The Bank of Washington.)

been made in the first or some subsequent instalment. Several witnesses were examined as to the circumstances of the above-mentioned endorsers, the result of whose testimony was, that *George Baird's* circumstances were considered good in 1819, and *George Morgan's* and *James Rice's* doubtful; and that *William Ashbrook* was insolvent. It appeared, further, that judgments to a considerable amount had been entered against *Joseph Pentecost* previous to the date of the bond, and that between its date and the time of his default in payment, several other judgments were entered against him; and that, on a sale of his property, made subsequently to the entry of the judgment on the bond taken by *Barrington*, there was an excess, (though not a very considerable one,) in the amount of sales over the aggregate amount of judgments entered before the date of the bond, which was applied to judgments entered subsequently to its date, but before the entry of judgment upon it.

At the close of the trial, *SHALER*, President, charged the jury as follows:—

“The present action is brought by The Bank of *Washington* against *John Barrington* and his sureties, to recover damages arising from breaches of the condition of a bond, given to indemnify the plaintiffs from any failure in *John Barrington* in the faithful performance of his duties, as cashier of The Bank of *Washington*.

“The bond of which oyer is given by the plaintiffs, is dated the 25th day of *August*, 1814. Its penalty is thirty thousand dollars. To the plaintiffs' declaration, which is in debt, the defendants have pleaded *non est factum* and performance of the condition. The plaintiffs have put in a replication of non-performance, and have assigned no less than thirty-four breaches of the condition. A few specifications have been abandoned; the greater part of them, however, the plaintiffs have endeavoured to sustain by testimony:—of their success in so doing, so far as facts are in issue, you are the exclusive judges; so far as the law is concerned, you will receive it from the court, and apply it to the facts that have been satisfactorily made out.

“The first point to which I shall direct your attention, is the construction of the condition of this bond. Although the instrument is very inartificially drawn, I find, upon examination, that the clause which defines the boundaries of the parties' liability, pursues, or nearly so, the terms of the fifth fundamental article of the general banking act of 1814.

“The condition of the obligation is, “that *John Barrington* shall well and truly perform his duties of cashier, to the best of his abilities.” The question then is, What is such faithful performance of his duties? Is it, as has been alleged, simply that he shall not defraud his employers? or is he not bound to conform to the general principles upon which all such institutions are conducted? The cashier of a bank has much indeed intrusted to him. Not only

(Barrington and others v. The Bank of Washington.)

the money of the stockholders, but that of depositors is in his power. *In the management of the business of the bank he has certain discretionary powers: in the employment of these he must govern himself with that degree of caution which a prudent man would exercise in his own affairs; and this discretion does not extend to those acts for which a board of directors is especially constituted, and such as fall within their customary duties. If, therefore, he undertakes to change the nature of the securities of the institution, without the assent of the Board, (unless, indeed, the circumstances are of a nature that render it peculiarly necessary to the institution, which circumstances he ought to make out on the trial,) and loss accrues from such change, he will become liable for breach of duty.*

“For mere mistakes, errors of calculation, such as in the management of great banking concerns must frequently occur, a cashier undoubtedly ought not to be held responsible. If the errors are so numerous as to afford reasonable ground to presume gross negligence, the rule would be otherwise; and if the errors are such as tend evidently to the benefit of the cashier himself, such errors would create strong suspicions against that officer, and, in proportion to the frequency of their repetition, and amount, would raise a presumption of a want of due fidelity in him. Where a party undertakes to act for another, he must show either the authority or the acquiescence of the principal. It would be singular, indeed, if it lay upon the party contending against the exertion of the power, to show that the person professing to act as agent, had no authority to do so.

“An important ground of defence arises under the plea of *non est factum*; that is, that the bond declared on is not the bond given by the defendants. The bond was originally signed by five persons. Since its sealing, and subsequent to its delivery, it has been defaced, by the erasure of the name of *Robert Haslett*, in the body of the instrument, and the pen has been drawn over his signature, opposite to his seal. What is the effect of this erasure? If made by the obligee, without the consent of the obligor, whether the erasure be in a material or immaterial part of the bond, it would thereby become void, and the plaintiff could not recover. If the erasure be made by the obligor himself, in a several bond, the obligor could not by such act discharge his responsibility. It does not appear very clearly to whom the bond was originally delivered. It must have been kept amongst the papers of the bank, and was taken from there by Judge BAIRD, President of the institution, and delivered by him, after his resignation, to Mr. *Brice*, a director. *Had this paper come into the hands of Judge BAIRD, free from erasure, it would then have become incumbent on the plaintiffs to satisfy you, as to the person who made the erasure, and by whose directions it was made, and if by the assent of the obligors, or either of them, to show that fact to the jury.*

(Barrington and others v. The Bank of Washington.)

If the obligee produces a bond on which there is an erasure, and which came into his hands without one; he must explain and account for it. The presumption is, that it was done by him, unless he gives circumstances in evidence to destroy that presumption. Whether you are satisfied that the bond on which this action is brought, was delivered to the proper officers of the bank and held by the institution, I am unable to say. If you are, by whom and by whose directions was the erasure made? If made by the cashier at the instance, and by the instructions of the directors, and without the assent of the other obligors, the bond is void; if made with their assent, it is still good against them. The evidence to show the assent of the obligors is certainly very slight, and if upon that subject you are not satisfied; *should you believe the erasure made by order of the Board, I am not aware upon what principle you can find against the defendants. But it is contended, in this case, that the bond was in the hands of Barrington, one of the obligors; that as cashier of the bank he held it; and that, when he delivered it to Judge BAIRD, the erasure was already made. If made by Barrington, without the consent of the Board, it was a fraudulent act in him, and his co-obligors are not discharged thereby.* Whether the erasure was made by him or not, and whether with or without the order of the directors, and whether with or without the assent of the other obligors, you will decide from the testimony."

The court then proceeded to charge the jury upon the several specifications of charges against *John Barrington*. In relation to the 21st specification, the court adverted to the principle which had been already laid down, with respect to the duties and liabilities of a cashier, and likewise to the testimony given upon this specification.

The judge then charged the jury, "*that if they believed that John Barrington had taken upon himself, without any authority from the Board of Directors, to discharge the endorsers upon the notes drawn by Joseph Pentecost, and to substitute in their place Pentecost's judgment, or if the cashier, without such authority, had done any other act by which the endorsers had been discharged, such discharge of the endorsers was a breach of the condition of the bond, and he, together with his sureties, became responsible for the AMOUNT OF THE NOTES from which such endorsers had been discharged by the act of the cashier.*"

To this opinion, the counsel of the defendants excepted.

Kennedy and Biddle, for the plaintiffs in error.

1. The special court had no jurisdiction of this case. The act of assembly of the 15th of March, 1816, *Purd. Dig.* 422, provides for special courts, where the judge before whom it would be regularly tried, has been counsel, or has a personal interest in the cause. And the act of the 23d of March, 1818, *Purd. Dig.*

(Barrington and others v. The Bank of Washington.)

424, which is a supplement to the first, and narrows its provisions, declares, that when the president of any judicial district shall be personally interested in the event of any suit pending, or to be instituted in his district, or shall have been concerned as counsel for either of the parties, or those under whom they claim, touching the same subject matter; or whenever it shall happen, that the title under which either party claims has been derived through such president, such suits shall be the subjects of the jurisdiction of special courts. Judge BAIRD had not been counsel in this cause, and it does not appear that he was personally interested in the event of it. The ground upon which the defendant below asked for a special court was, that the judge was interested in some points of law, which might be decided; and the judge, in his certificate, expressly declares, that he knows of no interest he has in the event of the suit. He was afterwards admitted as a witness, which is conclusive upon the question of interest, so far as the opinion of the court below goes. No consent of the defendants to the jurisdiction of the special court appears upon the record; and, if it did, it would not confer jurisdiction. Where a court is of limited jurisdiction, the want of jurisdiction need not be pleaded in abatement, but may be taken advantage of any time.

2. The cause was not put to issue. The plea of *non est factum* was without replication or issue; and there was no rejoinder to the plaintiffs' assignment of breaches of the condition of the bond. The manner of pleading on a bond with a penalty is, a declaration for the penalty; a plea of performance; a replication, assigning breaches, and a rejoinder to that replication. *Postmaster General v. Cochran*, 2 Johns. 413. *Caverly v. Nichols*, 4 Johns. 189. The record showed no agreement of counsel to waive formal pleadings, or a joining of issue, without which the judgment is erroneous. 2 Binn. 33. 3 Serg. & Rawle, 577.

3. The bond ought not to have been received in evidence. The act of the 21st of March, 1814, *Purd. Dig.* 56, makes it the duty of the Board to take a bond from the cashier, with two sureties, &c. But there was no evidence of a delivery of this bond by the obligors, nor of an acceptance of it by the obligees. The subscribing witnesses did not prove a delivery. The only evidence was, that it was found among the papers of the bank; but this was no proof of delivery nor of acceptance. It might have been sent to the Board for their approbation or rejection, and not acted upon. Delivery is essential to a deed; it takes effect from delivery, and there can be no delivery without acceptance. 1 *Shep. Touch.* 57, 58. 2 *Bl. Com.* 397. *Jackson v. Phipps*, 12 Johns. 418. There is no presumption that the bank accepted the bond. It was their interest to reject it, in order to get better security. The acceptance ought to appear on the minutes of the Board, which the act of assembly directs to be kept. There was an erasure, in consequence of which the bond was void; and it ought not to have gone to the

(Barrington and others v. The Bank of Washington.)

jury for that reason, as there was no evidence to account for it. *Esp. Ev.* 129.

4. The construction given by the court below to the condition of the bond was erroneous. The condition prescribed by the act of assembly, is for the faithful performance of the duties of the office; but, in the bond in question, the words, "to the best of his abilities," were added, which not being required by the act, are to be rejected. The part of the charge complained of, is that which makes the securities responsible for the cashier's mistake of his duty: for example, in undertaking to do what was not intrusted to him, but reserved for the Board of Directors, in consequence of which a loss happened. Sureties are favourites of courts, both of law and equity, and are not to be bound beyond the terms and precise scope of their engagements. *Ludlow v. Simons*, 2 *Caines*, 29. In the case of *The Union Bank v. Clossey*, 10 *Johns.* 271, it was held, that the sureties were bound only for the honesty of the first teller of the bank, and not for errors of judgment; and the same principle applies to this case. The obligation of the securities extended only to the honesty of the cashier, not to his abilities. Different banks intrust different matters to the discretion of the cashier; and it is often a nice matter to trace the line between the powers of the cashier and those of the directors. The bank had ceased discounting, and was winding up its concerns when *Pentecost's* notes were given up, and his judgment bond taken in exchange, and the cashier might well consider the bond as the best security; but for this error of judgment his securities were certainly not responsible.

5. The Court of Common Pleas charged the jury incorrectly upon the doctrine of erasure. The charge was, that if *Barrington* (who was the officer and agent of the bank,) made the erasure, without the knowledge of the obligors, the bond was not void as to them. The law is otherwise. Erasure by a stranger, without the privity of the grantor or grantee, makes a deed void. 1 *Shep. Touch.* 68. If a bill of exchange be altered in a material part, even by a stranger, it discharges the endorsers. *Chitty on Bills*, 130. The alteration of the date of a promissory note by the payee, avoids it. *Bank of the United States v. Russel*, 3 *Yeates*, 391. *Stephens v. Graham*, 7 *Serg. & Rawle*, 508. The alteration of a bond, by inserting another obligor, without the consent of the original obligors, vitiates the instrument. *O'Neal v. Long*, 4 *Cranch*, 160. PARSONS, C. J., in *Smith v. Crooker*, 5 *Mass. Rep.* 538, lays down the general rule to be, that an alteration by a stranger, without the privity of the obligor, avoids the bond. The same rule is recognized in other cases. *Den v. Wright*, 2 *Halsted*, 177. *Pigot's Case*, 11 *Coke* 27. 2 *Bulst.* 247, *S.C.* *Pemberton's Lessee v. Hicks*, 1 *Binn.* 14. The bond ought not to have gone to the jury, without some evidence by the plaintiffs accounting for the erasure, or showing that it was done by the consent of the obligors.

(Barrington and others v. The Bank of Washington.)

6. In saying to the jury, that if the paper came into the hands of Judge BAIRD free from erasure, it would lie on the plaintiffs to account for the erasure, the court below was wrong. It would lie on the plaintiffs to account for the erasure, if it existed, as it undoubtedly did, before the paper came into the hands of Judge BAIRD. A positive misdirection is error, though other parts of the charge may be to the contrary. *Work v. Maclay*, 2 Serg. & Rawle, 415.

7. There was error in instructing the jury, that if the cashier discharged the endorsers on any notes, by changing the securities, he and his sureties were answerable to the amount of the notes. This part of the charge related to *Pentecost's* debt of ten thousand dollars. If the cashier acted in this matter to the best of his judgment, as he probably did, his sureties are clearly not liable. Besides, it is probable that the whole amount of this debt could not have been recovered, if the securities had not been changed, and the measure of damages should have been the amount lost by the bank, in consequence of the change of securities, and no more. *Andrews v. Pardi*, 5 Day, 29. *Purviance v. Angus*, 1 Dall. 185. *Russel v. Palmer*, 2 Wils. 325. *Dearborn v. Dearborn*, 15 Mass. 318. *Sherman v. Goodman*, 13 Mass. 188.

8. The resolution of the Board of Directors, of the 31st of August, 1814, was irrelevant, and therefore not evidence. The object was, to prove that *Barrington* was cashier; but the resolution does not mention *Barrington*. Besides, there was a written paper proving the appointment, and this ought to have been produced.

9. Dr. *Murdock* was interested, and, consequently, not a competent witness. He was a stockholder when the bank became insolvent, and was liable, in case of a deficiency to pay the debts of the bank, for that portion of his subscription, which had not been called for and paid up; and this liability he could not divest himself of by a subsequent transfer of his stock. The charter was forfeited before the transfer.

10. Judge BAIRD was also an incompetent witness, on the ground of interest; for if the bank recovered of *Barrington* and his securities, on account of a transaction with BAIRD, BAIRD is bound to indemnify them. Besides, he had been a stockholder, and had not transferred his stock to the bank, but only given *Barrington* a power of attorney to make the transfer. The bank did not enforce the conveyance. On the contrary, they claimed from *Barrington* the whole amount of the sum credited by him to Judge BAIRD's account, and have obtained a verdict and judgment for the whole amount. *Towle v. Stevenson*, 1 Johns. Cas. 110. *Codwin v. Hacker*, 1 Caines, 527. In truth, the stock remained the property of Judge BAIRD, and therefore he was clearly interested. [N. B. This point was made by Mr. Kennedy alone; his colleague being of opinion that it could not be sustained.]

(Barrington and others v. The Bank of Washington.)

11. The resolution respecting the striking out of *Haslett's* name from the bond, ought not to have been received in evidence, because there was not a competent number of members present, as required by the act of assembly, 7 *Serg. & Rawle*, 392. It was a resolution, too, in their own favour, and thus they made evidence for themselves.

12. In saying to the jury, that he was not aware upon what principle they could find for the defendants, the President of the court below expressed himself too vaguely, and left the jury to judge of the law, which was error.

Baldwin, for the defendants in error.

1. The parties agreed that this cause was the proper subject of a special court, and no objection to its jurisdiction appears upon the record. The acts of 1816 and 1818 are both in force; the latter being a supplement to the former. The judge certifies the cause for a special court when he thinks proper. This cause was regularly certified, and no objection made. This court, therefore, cannot take cognizance of any objection now made. Judge BAIRD, at the conclusion of the certificate, says; "I certify all facts really existing, necessary to give jurisdiction."

2. The exception, founded on the want of joining issue, ought not to prevail; because it may be collected from the record, that both parties agreed to try the cause, and consider the issue as joined upon the pleadings, as they were. The charge of the court shows that the parties considered the issue joined, both on the plea of *non est factum* and the plea of performance, with the assignment of breaches by the plaintiffs. There is no settled rule of this court, that a judgment must be reversed, unless mention is made of issue, and no case to that effect can be produced. The plea of *non est factum* concludes to the country, and thus presents a direct issue. If the assignment of breaches is not replied to, it is the fault of the defendants, of which they cannot take advantage. In *New York*, mis-pleading is cured by verdict, (12 *Johns*. 353;) and here the most trifling circumstance is laid hold of to prevent the reversal of judgment for want of an issue, after trial on the merits. 2 *Serg. & Rawle*, 337. 9 *Serg. & Rawle*, 67.

3. [The counsel for the defendants in error was told by the court that it was unnecessary to argue the third exception.]

4. The condition of the bond was correctly construed. The language of the court below was, that "the cashier should exercise such care and prudence, as a man should reasonably use in his own affairs." This was right, for, by accepting the office, the cashier undertakes for a reasonable knowledge of his duty. 1 *Livermore on Agency*, 339, 341. The court also said, that "the cashier should not usurp the powers reserved to the Board, and that if he exchanged one security for another, he should be responsible for any loss." This was the least that could be said; and even this was qualified by the court, by excepting extraordi-

(*Barrington and others v. The Bank of Washington.*)

nary cases of emergency, and involuntary mistakes in calculation. It is not law, that this bond only stipulates for the honesty and morality of the cashier. Every man is responsible for gross negligence, and especially an officer who receives a salary. Gross negligence makes even a gratuitous agent responsible, and an agent for reward is held more strictly. *Livermore on Agency*, 342, 352.

5. *Barrington*, the cashier, by whom the erasure was made, was no stranger, but one of the obligors; and no case goes so far as to say, that this would discharge the others. It was an act of infidelity in his office, for which the obligors are responsible. It is not generally true, that every alteration by a stranger avoids a deed. If the seals of a deed be torn off by a child, the deed is good. *Palmer*, 403. *Latch*. 226. A deed torn by a stranger, by accident, remains valid. *Bro. Ab.* 88. 13 *Vin.* 44. An estate conveyed by deed remains, though the deed be destroyed. *Vent.* 297. 2 *Johns.* 84. An alteration by one of several obligors, does not affect a bond. *Shep. Touch.* 68. 1 *Gallison*, 69, 71. 15 *Johns.* 297. *Cro. El.* 408, 546. 5 *Co.* 23.

6. It is not necessary to defend every word of the charge of the court below. It is enough, if, upon the whole, it can be supported. One part may be explained by another. The charge, upon the whole, was right,—that, if the bond was altered by the consent of the obligors, it was void. As to its coming to the hands of Judge BAIRD, the meaning of the judge was, that if it came to his hands unaltered, it lay upon the plaintiffs to show how, and by whom it was altered; and in this there was no error.

7. The only proper measure of damages, in this case, was the amount of *Pentecost's* notes delivered up. These notes had been discounted by the bank, and were not due when they were given up by the cashier. What they were then worth, it was impossible for the jury to ascertain. They might have been paid or secured, although neither the drawers nor endorsers were worth the money. In commercial law, if a man gives up a note or bill, he makes it his own. *Miner v. Tagert*, 3 *Binn.* 204. *Chitty on Bills*, 258, 272, 375. 18 *Vez.* 20, 21. 3 *Johns.* 230.

8. The resolution of the Board of Directors, of the 31st of *August*, 1814, was not irrelevant, because it showed that there was an existing cashier; and it was shown, by other evidence on the part of the plaintiffs below, that *Barrington* was cashier *de facto*. It was introductory to evidence of the cashier's bond, on which suit was brought.

9. Dr. *Murdock* having sold out and transferred his stock, he had no longer any interest, and was therefore a competent witness.

10. [The counsel thought it unnecessary to speak to this exception, in consequence of what had fallen from the court.]

11. The resolution of the directors, authorizing *Haslett's* name to be stricken from the bond, was evidence, notwithstanding there were not enough members present to constitute a Board, because

(Barrington and others v. The Bank of Washington.)

the minutes being kept by *Barrington*, his acts were evidence against him and his sureties; besides which, it was evidence that the Board was in possession of the bond.

12. [The court informed the counsel, that he need not argue the twelfth exception.]

The opinion of the court was delivered by

DUNCAN, J. The real matter in controversy between the parties, was on the construction of the instrument declared on, as the joint obligation of the plaintiffs in error, and its binding force on them, after the material alteration, by the erasure of the name of *Robert Haslett*, one of the joint obligors.

The other questions are subordinate; but, as the case goes back, and all the points may be relevant, it is made the duty of this court to give an opinion on all.

The first error assigned, is to the jurisdiction of the court. The presiding Judge of the Court of Common Pleas thought proper to certify and return this case for trial to the special court, and the parties went on to trial without exception, as on a case properly certified. The requisite certificate has been given to confer jurisdiction, and the course of the argument shows the propriety of the certificate; for even the counsel of the plaintiffs in error draw different conclusions, as to the interest of the President. While one admits that he had no interest, and was a competent witness, the other contends, *totis viribus*, that he was interested, and therefore improperly received; and it is one of the errors assigned, and which this court is now to decide, that he was incompetent as a witness. In a case so circumstanced, every unprejudiced man will admit, that the judge, even though, in his private judgment, he might suppose he had no interest, yet he took the safest and justest ground, in certifying the cause. It was a case of doubt and difficulty:—the judge has certified all the facts necessary to give the special court jurisdiction, and we are not, in a court of error, to say he has improperly certified, when all parties agreed, without objection to the jurisdiction, to go on to trial; even though we decide, that, as the record stands, he was a competent witness.

The second error is, that the cause was not put to issue, there being no replication to the plea of *non est factum*, and no rejoinder to the plaintiffs' assignment of breaches. After a trial on the merits, in any case, (I speak here only my own opinion,) where the party has had the full benefit of his defence to the action, I would feel a strong disposition to maintain the verdict. I have before expressed this opinion in *Jordan v. Cooper*, 3 Serg. & Rawle, 583. It has been so settled in *Massachusetts*. 9 Mass. Rep. 552. And, in *New York*, in *Snyder v. Snyder*, 4 Cowen, 394, the court suffered the replication to be added by way of amendment, *nunc pro tunc*, where the plaintiff had neglected to

(Barrington and others v. The Bank of Washington.)

reply to the statute of limitations. The courts in *Westminster Hall*, have nearly done the same thing. But, without now deciding the general question, all the members of this court, who heard the argument, are of opinion, that, on inspection of this record, it shows an agreement of the parties to go to trial, waiving the impropriety of the pleading on the record, as it stood; for on the eve of the trial the defendants pleaded performance of covenants, and received, instead of a regular assignment of breaches, an informal specification. The parties agree to go on to trial "on a specification of charges relating to the suit of *The Bank of Washington, Pennsylvania, v. John Barrington* and sureties." After this, it would reflect little credit on the administration of justice, to set aside a verdict in which the court and jury had occupied many days; and when it appears that there was a minute investigation of every matter which the plaintiffs in error suggested as a defence; where they had the benefit of all the defence and evidence, as well on the plea of *non est factum*, as on each breach stated in the specification.

The third, fifth, and twelfth specifications of error, all relate to one great question of fact,—the question whether, after the erasure of the name of *Robert Haslett*, the bond became the joint obligation of the plaintiffs in error and *Thomas Acheson*; or whether that act did not render it void. I have reserved this question, to be considered in the last view to be taken of this case.

The fourth error assigned, is the construction of the condition of the bond:—"That *John Barrington*, the cashier, shall well and truly perform the duties of cashier of the bank aforesaid, to the best of his abilities." It has been contended, that, "to the best of his abilities," restrains the guarantee to acts of infidelity and dishonesty, and that they were so intended, not being used in the general banking law; and therefore if the act be done ignorantly, but not dishonestly, however injurious it may be to the institution, however contrary to the official duties of the cashier, still, if there be no corrupt motive, the securities are not liable. While I admit the ingenuity, I cannot agree to the solidity of the argument. The covenant is, that the cashier will discharge the duties of his appointment; that is, with competent skill and abilities. A man who accepts an office or trust, of any kind, contracts that he will exercise it with competent skill and ability; and his sureties, who are bound that he will execute it according to his ability, warrant for the performance of this contract of the officer. A man cannot go beyond his abilities; but, in appointments of this kind, it is an undertaking that the officer will act according to the duties of his station; and if he transcends the known powers of a cashier, by changing the securities of the bank, without their knowledge, and loss has accrued by the abuse of his trust, the loss falls within the words of the condition, and the sureties are re-

(Barrington and others v. The Bank of Washington.)

sponsible for the amount of such actual loss. Of the charge of the court, in this particular, the plaintiffs in error have not just cause of complaint.

But I am of opinion, that they have sustained the seventh specification of error. *Barrington's* sureties were not by his misconduct, by his change of securities, by his acceptance of *Pentecost's* judgment, and agreement to suspend proceedings on that judgment, converted into the securities of *Pentecost*: they are only responsible for the damages which probably resulted from the change; and then the bank should have shown that they could have recovered the whole, or part of the debt, by evidence of the circumstances of *Pentecost* and his endorsers. 2 *Wils.* 328. Whether there was sufficient to pay in whole or in part, if the security had remained unchanged, should have been left to the jury. It was a question of *quantum damnificatus*; not a commercial question, nor an action for a tort committed by the securities, but indemnity for a loss proved to have been sustained; an open question of actual pecuniary loss; not a closed one, where the measure of damages was the amount of the debt, but one for the consideration of the jury;—what has been the injury sustained; what has the bank lost by this unauthorized act of the agent? If the security was good, then the bank has lost the whole debt by the change. If partially good, then the amount of the sum, which probably would have been recovered from them. If nothing could have been recovered from them, then only nominal damages against the sureties. The damages cannot be in the nature of punishment, or penalty. Now, under this charge of the court, there might have been recovered from the sureties more than the bank could have recovered from their debtors. Place the bank in *statu quo*, the damages would be compensatory:—go beyond this, and they are vindictive, and vindictive damages are never given against sureties.

The eighth assignment of error, is in admitting evidence of the Board of Directors of the 31st of *August*, 1814. As this cause goes back, it is proper to state under what circumstances the entry would be evidence. The evidence of *George Morgan*, being received to show the actual appointment of *Barrington* by a Board of Directors, and the written memorandum of that appointment, if, on a proper search, that paper cannot be found, proof must be made of its contents, and the direction given to *Barrington* to enter it on the minute books, leaving a blank for Mr. *Morgan* to insert the name of the cashier. But if no evidence was given of any memorandum in writing, nor trace of entry to be found of the appointment, evidence would be admissible to show that *Barrington* continually acted as cashier of the Bank. The books of the bank were all in his handwriting, and kept by him; all bank notes were attested by him; every act which would fall within the functions of a cashier being proved to have been

(Barrington and others v. The Bank of Washington.)

done by him; the bond, the deed of the defendants, stating him to be the cashier; all this would be satisfactory evidence of his appointment as cashier; and though the entry of the 31st of *August*, 1814, might not be evidence *per se*, yet, connected with the other evidence, it would be evidence of his appointment; and all this would satisfy even an allegation that he was duly appointed.

If the bills of exceptions on which the ninth and tenth errors are assigned, had stated that Dr. *Murdoch* and Judge BAIRD had been original subscribers to the bank, it would have been a most serious question, whether, as the bank had forfeited its charter, and was unable, from the funds paid in, to pay its debts, they would have been competent witnesses to increase a fund, to lessen the debts that otherwise might fall on them, in proportion to their original subscription; for only seventeen and a half *per cent.* has been paid in, of fifty *per cent.* subscribed. But this is not so stated,—it may be so, or it may not be so. As the cause goes back, and is a very interesting one, it is desirable it should go back without prejudicated opinions, on matters, which, from the state of the record, it is not made the duty of the court to decide. On another trial, if such be the fact, it should be so stated; but the fact is not apparent on the record, that these gentleman were original subscribers. They may be so, or only assignees. If assignees only, they would not be liable further than as stockholders. The court does not perceive any interest Judge BAIRD has in the event of the trial. The cashier had discharged him from so much debt to the bank as his stock amounted to. I cannot see that the securities could recover from him in any form of action, if judgment was rendered against them for this item in the specification.

The eleventh exception respects the entry of a resolution of certain directors, but not a competent number to constitute a Board, of the 19th of *April*, 1815, in the book of minutes, in the handwriting of the cashier: “Resolved, that the name of *Robert Haslett* be struck off the said bond of security for the cashier, provided the other securities agree thereto.” I cannot say, that the evidence was not admissible for any purpose. Had it been offered for the purpose of showing a consent by the plaintiffs in error to the alteration, it should have been rejected; but it is some evidence; it is evidence that the Board was in possession of the bond, with all the names on it, in *April*, 1815. It proves that the bank then held the bond unaltered, and that the obligors had not then consented that the name of *Haslett* should be struck out, and be no longer bound, and they continue to be bound.

We come, in conclusion, to the consideration of the third, fifth, sixth, and twelfth exceptions. These relate all to the great question on the merits; the erasure of *Haslett's* name, and whether, from the evidence, he became loosened from this joint obligation, while the responsibility of the others was not only continued, but

(Barrington and others v. The Bank of Washington.)

increased. To them the alteration was most material. While it increased their responsibility, it changed the very nature of their obligation. Instead of being the joint bond of five, it became the joint bond of four. It ceased to be the same joint contract. Its identity and individuality were destroyed. The plea of *non est factum* puts in issue the execution of the bond, and its continuance, as the deed of all the joint parties, to the time of the plea. Formerly the judges decided on profert or view of the deed, whether it was void by reason of interlineation or erasure; but when deeds became voluminous and multiplied, they found it inconvenient to decide on demurrer, and referred it to the jury. It is now a fact for the jury to decide, whether it is the same identical contract declared on. 10 Co. 92. Bull. N. P. 267. As the law formerly stood, the destruction of the whole deed, or its loss, amounted at law to a destruction or loss of the debt. If mice gnawed off the seal, the obligation was extinct. This was with some struggle got over in the courts of law; for a man may now declare without profert, stating the deed to have been lost by time or accident. A spoliation of a part of the deed falls within the same reason. It is unnecessary critically to examine the ancient doctrine; it is sufficient to say, that the same rigour does not prevail as to the alteration of deeds. But, while the same rigour does not prevail, still the law views the alteration with a jealous eye, and requires evidence by the obligee, for the burthen of proof is on him, *that, if the alteration be material, it was done without the consent of the obligee; or, if done with his consent, the consent of all the parties in interest should be proved. A rule of common sense and justice now obtains, that an alteration in a material part, against the consent of the obligor, does not void the instrument, any more than its total destruction would.* Jackson v. Martin. 15 Johns. 295. 2 Evans's Pothier, 180, 181. And it appears well settled in the Supreme Court of the United States, *Specker and others v. The United States*, 9 Cranch, 26, *that the name of an obligor may be rased from a bond, and a new obligor by consent of all parties added, without making the bond void, and such consent may be proved by parol.* So that the execution and delivery of the bond being proved, and the bank making it part of the case, that in April, 1815, the name of Robert Haslett was on the bond, by bringing the action against the others, omitting his name, admit that the alteration was made with their consent, and was not a fraudulent alteration of the name of the name of *Haslett*; for, if fraudulent and without their consent, then, on the principles stated, it continued the joint bond of all, and the action should have been brought against all, and they could not have dropped the name of *Haslett*; and if *Haslett* continued bound, which he did unless the bank released him, then it is not the joint obligation of these individuals, but their joint obligation with *Haslett*. It is not the

(Barrington and others v. The Bank of Washington.)

same joint contract, but a different one. The only question then would be, Did all the plaintiffs in error, with *Thomas Acheson*, consent to this alteration? Is there satisfactory evidence of this fact? I would not require a solemn re-execution and re-delivery of the bond. The consent of all might be proved by parol; but then it should be proved, and not conjectured. It was not a question to be inquired into by the jury, whether *Haslett's* name had been fraudulently erased or not; though it would have been, had he been sued as a joint obligor; for that which is admitted by the pleadings need not be proved. It cannot be denied by the bank, that the alteration was made with their consent. Their allegation is on the joint bond of four. Was that the view of the case presented to the jury, or were they not instructed by the court to settle two facts, and, if either of them was found against the plaintiffs in error, then the verdict was to be for the bank? In either alternative, the securities were bound. The first was,—Was the alteration made fraudulently, without the consent of the bank? and, if the jury so found, then, whether the securities consented or not, still they were bound. The other question was, Did they consent? This is the plain meaning of the charge. If it was not, then it was so obscurely expressed by the court, that it would tend to mislead the jury. The judge who delivered the charge, always expresses himself with perspicuity:—"It does not," says the opinion, "appear very clearly to whom the bond was originally delivered. It might have been kept among the papers of the bank, and was taken from them by Judge BAIRD, President of the institution, and delivered by him, after his resignation, to Mr. *Brice*, a director. Had this paper come into the hands of Judge BAIRD, free from erasure, then it would have been incumbent on the bank to satisfy the jury, as to the person by whose direction it was made, and if by consent of these obligors, or either of them, then to show that fact to the jury." But as the bank by this action did admit that *Haslett's* name was withdrawn by their consent, then whoever had the custody of the bond, it was incumbent on the bank to prove that it was by consent of all, and not by consent of either; for if all did not consent, then it was not the joint obligation of all—it was not their deed.

The evidence of this consent the court states to be slight, but the concluding sentence of the charge, the last words to the jury, put it, not on the consent of the obligors, but on the fraudulent alteration of the bond, without the consent of the obligors, by the cashier. "If it was done without the consent of the Board," says the court, "it was a fraudulent act, and his co-obligors are not discharged." What would be the consequence of that? If the co-obligors were bound, *Haslett* continued bound; yet it was expressly admitted in the argument, as well as conceded by the form of action, that *Haslett* was released. The action is founded on that assumption, and all the argument on both sides proceeded on

(Barrington and others v. The Bank of Washington.)

this principle. This cannot be right; for on a recovery in this action against the plaintiffs in error, they could have no contribution against *Haslett*; and, taking the whole charge together, any jury must conclude that they were instructed, that if the alteration was made by *Barrington*, without the consent of the bank, it was fraudulent against all but *Haslett*, whether the obligors consented or not; whereas, if it was fraudulent against the bank, the bond retained all its original force, and bound all. If the bond was good as to one, it was good as to all. By the bank's ratification of the erasure of *Haslett's* name, they released him; and the obligation being a joint one, the release of one was the release of all; for, if it was not so, then an additional burthen would be cast on the plaintiffs in error, without their consent. This would be manifestly unjust. They have a right to say, "*Non in hæc vincula venimus*. Five were bound jointly, and, without our consent, you attempt to make it the joint deed of four. It is not the individual bond we executed." For, in all cases where the obligation was on the deed of the parties, and after, and before action brought, it becomes no deed, either by erasure or addition, the defendant must satisfactorily prove, *non est factum*. The question is, what it is at the present time? 5 Rep. 119. Two seal a deed; the seal of one of them is broken off. He shall say, *non est factum*, and this shall avoid the obligation. Br., *Obligation*, pl. 93, 3 H. 7. And where the alteration is injurious to one of the obligors, the law is reasonable in requiring evidence, not amounting, I admit, to re-execution of the bond, (yet that was the opinion of the learned judge in *Specker's* case;) not requiring all that solemnity, which its first execution did, yet requiring evidence of a consent by all to the alteration, and an agreement by those whose responsibility was to be increased, to remain bound alone, as if the name of one had not been erased; as if he had never been bound; a *quasi* re-execution of the bond, by their agreement to continue bound.

I am therefore of opinion, there was error in this part of the charge, and that, for all the reasons given, the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 19, 1826.]

SHAEFFER *against* JACK.

IN ERROR.

The remedy given by the act of the 5th of *March*, 1790, upon a sheriff's official bond, is not cumulative to that of the act of the 27th of *March*, 1713, but precludes a proceeding under that act.

A WRIT of error having issued to a special Court of Common Pleas of *Westmoreland* county, it appeared, on the return of the record, that the plaintiff in error, *Frederick Shaeffer*, brought this action of ejectment against the defendant in error, *Wilson Jack*, for the premises described in the writ.

In the court below, a case was stated for its opinion, to be considered as a special verdict,—which was in substance as follows:—

Frederick Shaeffer, the plaintiff, obtained a judgment in the Court of Common Pleas of *Westmoreland* county, at *September* Term, 1801, against *Philip Steinmetz*, for thirty pounds nineteen shillings and sixpence, with interest, from the 20th of *November*, 1801. A writ of *fieri facias*, issued to *June* Term, 1802, upon the said judgment, to which the sheriff, *John Brandon*, esq., returned, “Goods levied.” The Commonwealth of *Pennsylvania* brought suit against the said *John Brandon*, sheriff of the said county, and *James Brady* and *John Kirkpatrick*, his sureties upon his official bond in the Court of Common Pleas of the said county, to *June* Term, 1805, and on the 23d of *July*, 1805, obtained judgment. To *May* Term, 1821, the said *Frederick Shaeffer* sued out a *scire facias* upon the judgment against the said *John Brandon* and his sureties; and, on the 1st of *October*, 1821, obtained judgment in the *scire facias* for one hundred and eighty dollars and eighty-seven cents, the amount for which the above-mentioned *fieri facias* had issued. The said *John Brandon*, at the time of entering into his official bond, and at the date of the above-mentioned judgment against him and his sureties, was seized and possessed of the premises described in the writ. By deed dated the 22d of *April*, 1807, the said *John Brandon* and wife conveyed the premises to *Samuel Jack* and *John Curt*, as tenants in common. To *November* Term, 1821, the said *Frederick Shaeffer* issued a *fieri facias* upon his judgment, against the said *John Brandon* and his sureties, which was levied on the premises in question; and an inquisition being held thereon, they were extended. *Shaeffer* sued out a *liberari facias* to *February* Term, 1822, which, not having been executed, he issued an alias *liberari facias* to *November* Term, 1822, upon which the premises were valued at one hundred and fifty dollars *per annum*, and delivered to the said *Frederick Shaeffer*.

To *June* Term 1809, a *scire facias* issued out of the said court.

(Shaeffer v. Jack.)

at the suit of *Nicholas Willison*, upon the original judgment against *John Brandon* and his sureties, and on the 29th of *December*, 1809, judgment was obtained for three hundred and fifty three dollars and ninety-six cents. Upon this judgment a *feri facias* issued, returnable to *March* Term, 1810, and a *venditioni exponas*, to *November* Term, 1810. Another writ of *scire facias* issued on the said original judgment, against *Brandon* and his sureties, to *June* Term, 1809, in which judgment was obtained on the 29th of *December*, 1809. A *feri facias* issued on this judgment to *March* Term, 1810, upon which the premises described in this ejectment were levied upon and extended. Another *scire facias* issued upon the said original judgment against *Brandon* and his sureties to *November* Term, 1810, and on the 21st of *May*, 1812, judgment was confessed, the amount to be ascertained by the attorneys. Another *scire facias* issued on the said judgment, against *Brandon* and his sureties to *December* Term, 1809, in which judgment was obtained on the 3d of *April*, 1810. Upon this judgment a *feri facias* issued, returnable to *May* Term, 1810. Another *scire facias* issued to *February* Term, 1811. Judgment was obtained thereon on the 23d of *November*, on which a *feri facias* issued to *May*, 1812, and a *venditioni exponas* to *November* Term, 1812. Another *scire facias* upon the said judgment, against the said *Brandon* and his sureties, issued to *August* Term, 1811, in which judgment was confessed *April* 30th, 1812; and another *scire facias* issued on the said judgment against *Brandon* and his sureties to *May* Term, 1820, in which no judgment was rendered.

Upon the facts above stated, the President of the Court of Common Pleas delivered the following

OPINION. The lien of the original judgment against *Brandon* expired in five years after its entry, by the act of the 4th of *April*, 1798, second section, unless it was a cautionary judgment, or had been revived in due time by *scire facias*. That the judgment was not cautionary, is settled by the decision of this court in the case of *The Commonwealth v. Lohra et al.*, for the use of *Brandon* and his sureties, No. 178, of *May* Term, 1820. There has been no revival by *scire facias* to affect the present defendants; but it is contended, that, as the judgment was a lien at the time of their purchase, they were purchasers with notice of the lien, and that, as to them, it needed no revival by *scire facias*. In the case of *Hern and Co. v. Hopkins*,* the same argument was urged in favour of a mechanic's lien, upon which a judgment had been obtained, but which was limited by the statute to an operation of two years, on account of its not having been filed within six months from the completion of the building to which it attached. The Supreme Court held it under advisement for a year, and decided

* See 13 *Serg. & Rawle*, 269.

(Shaeffer v. Jack.)

against the plaintiff. The cases are not precisely parallel. But in that case, as in this, the lien existed at the time of the defendant's purchase, of which he had, as in this case, notice; but the interested party permitted it to expire by the statutory limitation, and the defendant had the same advantage which would have been given to those purchasing after the period, to which the lien had been limited, had expired. To me, the act of 1798 seems very plain. The lien of the judgment no longer exists, after five years have elapsed from its date. I see no reason for limiting the construction of the act, so as to exclude from its benefits those who have purchased intermediately. As this is the first case of the kind which has occurred, it will, I trust, be carried to the Supreme Court, in order that the law may be there settled on due consideration. I am of opinion, that judgment on the case stated should be entered for the defendant.

After argument, by *Coulter* and *Alexander* for the plaintiff in error, and *Foster* for the defendant in error, the opinion of the court was delivered by

DUNCAN, J. There is a question attempted to be raised on this record not necessary for the court to give an opinion on; that is, whether a subsisting lien by judgment, at the time of alienation, continues on the lands in the hands of the assignees, though more than five years have elapsed without any proceedings on the judgment; because it is quite clear that *Shaeffer*, the plaintiff in the judgment, the purchaser at sheriff's sale, and the plaintiff in this action, never had a judgment on the sheriff's bond, until *October*, 1821, and then it was an erroneous one; for there was nothing on which to issue a *scire facias* in the name of *Shaeffer*, and *Jack* and *Curt* were purchasers from the sheriff fourteen years before. The official bond was under the act of the 5th of *March*, 1790, entitled, "An act relating to the securities to be given by sheriffs and coroners." It was an entire new system,—the security different and the mode of proceeding totally different. The former one the legislature declared was inadequate. That act first gave a recognizance to bind the lands of the officer from its caption, regulated the proceedings on that, and introduced a speedier remedy for the suitor, and one less embarrassing to the sureties on the personal obligation. Under the act of 1713, the mode of proceeding on bonds given to the government for the discharge of official duties, either by sheriffs or coroners, was by an action in the name of the commonwealth for the penalty. Judgment was given for the penalty;—this enured to the use of all parties aggrieved, each of whom instituted his *scire facias* on that judgment, and recovered his own special and particular damages for the misconduct of the officer; and so each one, *toties quoties*, until the whole amount of the penalty was recovered. Priority of right, where the whole penalty was recovered, was obtained by priority of

(Shaeffer v. Jack.)

scire facias. But the act in question gives a new and different remedy, by original action. It provides, "that where the Commonwealth, or any individual, shall be aggrieved by any sheriff or coroner, it shall be lawful, as often as the case may require, to institute their actions of debt, on such bonds, against such securities; and, if upon suits it shall be proved what damages have been sustained, and a verdict and judgment be therefor given, execution shall issue for so much as shall be found by the said verdict, with costs, which suits may be instituted, and the like proceedings thereupon be had, as often as damage is so as aforesaid sustained; provided, that such suits against such sureties shall be instituted within seven years after the date of their several bonds."

The argument, on the part of the plaintiff, is, that this remedy is cumulative to that of the act of 1713, and that a party has a right to proceed by the one form or the other; that an affirmative statute does not take away the common law, much less a precedent statute. This is denied in the broad latitude assumed, and must be taken with much restriction; for from the very nature of all legislation, the last law must prevail, not only where it expressly repeals the former, but where its provisions are inconsistent with the former, though there be no annulling words or repealing clause; for every affirmative statute is a repeal by implication of a precedent one, so far as it is contrary thereto, although there be no negative words. 4 *Inst.* 43. 11 *Rep.* 61. 2 *Wils.* 146. Affirmative words in a statute often have a negative operation. 1 *Cranch*, 174, and always have and imply a negative where the matter is clearly repugnant. But what is conclusive, is, that this purports to be, and is, a general regulation of the whole subject matter; and wherever a subsequent statute reverses, and is intended clearly as a substitute, it repeals all former acts, though there be no words of repeal. *Barlett v. King's Executors*, 12 *Mass. Rep.* 545. *Rex v. Cator*, 4 *Burr.* 2026.

The word *may* is often construed as imperative; and, in a case on the very doctrine of assigning breaches, it has been considered as compulsory, before the statute of 3 *W.* 111, c. 11.

In debt on a penalty for the performance of covenants, the plaintiff not only had judgment to recover the penalty, but was entitled to take out execution for the whole. That statute introduced a new mode,—the assignment of breaches,—damages to be assessed on the assignment of breaches. The statute was not negative, and it purported, not to repeal any former law, but declared the plaintiff "may assign his breaches, and the jury shall assess damages for the breach assigned." The words of the statute were, *may* assign, *may* suggest. Yet this, after much discussion, was settled to be compulsory, and that it is not in his power to refuse to proceed on this new regulation; and if he proceeds otherwise, his judgment is erroneous, and a *venire facias de novo* will be awarded. See note 1 to *Gainsford v. Griffith*, 1 *W. Saund.* 58, and

(Shaeffer v. Jack.)

note to *Roberts v. Marriett*, 2 *Saund.* 187. In *The Commonwealth v. Gable*, 7 *Serg. & Rawle*, 426, 430, the construction of the word *may* being compulsory was adopted, and it was there held it was frequently construed as *shall* in statutes; and in the cases under the statute of *William* referred to, where the statute enacts the doing of a thing, for the sake of justice or the public good, the word *may* has the same meaning as *shall*.

The inconsistencies between the provisions of the act of 1713 and those of the act of 1790, are numerous. In the one case, the judgment binds all the lands of the obligors, to the amount of the whole penalty recovered; in the other, only for the amount of damages assessed, and it is only to the party who sues; in the other it is a judgment for all; in the one case it is cautionary, to the whole amount of the penalty; in the other it is absolute for the particular damages sustained by the party who pursues his action. In the one, it is by original action for the whole sum, and for all; but none can sue out execution until his particular damages are assessed, on a judicial writ of *scire facias*; in the other case, a man sues out his original writ for himself, and recovers in the suit for himself, and for his own damages. In the one case, if judgment is once obtained, and the judgment cautionary, a party may sue indefinitely on his *scire facias*; in the other, he must bring his original action against the sureties, within seven years after the date of the bond. But the argument is pregnant not only with these inconsistencies, but falls to the ground. It is, that the remedy is cautionary for the benefit of all the suitors; but, if it be so, that there is a cautionary judgment for the whole penalty, then all are bound by the act of the first man who sues and obtains a judgment, in the name of the Commonwealth, for the penalty; for that, being a judgment for the use of all, all must follow that track. But what if the first suit be according to the provisions of the act of 1790, and there is a recovery to the amount of the damages sustained by one, will a suit lay at the instance of another, and there be a judgment for the whole penalty? The incongruity would be so monstrous, the inconveniences to the sureties be so great, that this never could have been the intention the legislature. Their intention was plain,—a substitution of this course much more simple and expeditious to the suitors, and less inconvenient and embarrassing to the sureties, for the former which had been found inadequate. How long is this cautionary judgment to remain a lien? It would be indefinite. The intention of the legislature was, that it should be absolute and certain, and therefore within the limitation of five years. The plaintiff in error never had a judgment, good or bad, against *Brandon* and his sureties, until 1821; he therefore had no lien on the property purchased and aliened in 1807, and the sheriff's sale gave him no right. Something was said about *Brandon's* recognizance binding this land, and that the plaintiff might resort to a sale on that. If he does, it must be by an action

(Shaeffer v. Jack.)

on the recognizance. But the question is on the operation of a judgment, of a judgment by this plaintiff, obtained in 1821 on the bond; and it is, whether that binds lands aliened in 1807? For that is the question, if the opinion of the court be correct on the act of 1790, that it was compulsory; for the counsel of the plaintiff in error properly admitted, while they contended with all force against that construction, that, if it prevailed, the opinion of the Court of Common Pleas was right. The court is clearly of opinion, that this is the true construction, and that the judgment should be affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 19, 1826.]

DUNN and others *against* The COMMONWEALTH.

IN ERROR.

An action cannot be maintained on a sheriff's official bond, taken under the act of the 28th of *March*, 1803, in the name of the Commonwealth alone, for any injury done to an individual, by the official misconduct of the sheriff: nor can the court, before which the cause is tried, permit the declaration to be amended, by the introduction of the name of the individual, as a party, so as to make it a suit for his use.

A certified copy of a sheriff's official bond, is not evidence, if it does not appear to have been taken by the Recorder of Deeds, in the manner prescribed by law.

ON the return of a writ of error to the Court of Common Pleas of *Mercer* county, ten errors were assigned in the record, arising upon bills of exceptions, taken by the plaintiffs in error, the defendants below, to the opinion of the court, upon points of evidence, and in their charge to the jury. Only two of these exceptions being noticed in the opinion of this court, it will be sufficient to state only the facts connected with them.

In the court below, this was an action of debt, brought in the name of the Commonwealth of *Pennsylvania* against *Allan Dunn*, sheriff of *Mercer* county, and *John Barns*, *John Kerr*, *James Montgomery*, and *David Garvin*, his sureties upon the official bond of the sheriff. In the declaration, breaches were assigned generally, in the words of the condition of the bond.

After the jury had been sworn, the counsel of the plaintiff moved to amend the declaration, by specially assigning the breach of the condition to be, in not well and truly executing a writ of *fieri facias*, issued out of the Court of Common Pleas of *Mercer* county, on a judgment obtained in the said court by *J. Adams*, *J. Knox*, and *T. Nixon*, against *Jacob Herrington*, and directed to the said sheriff of *Mercer* county, and delivered to the said *Allan Dunn*, the sheriff of the said county, returnable to *Feb-*

(Dunn and others v. The Commonwealth.)

ruary Term, 1822; and in not well and truly executing a writ of *venditioni exponas*, issued out of the said court, on the said judgment, and delivered to the said sheriff, returnable to November Term, 1822; debt, three thousand, two hundred and sixty dollars, and eighty two cents, &c. The counsel of the defendants objected to the amendment, but the court permitted it to be made; and this was the first error assigned.

The plaintiff's counsel offered in evidence the bond upon which suit was brought, which had been entered in the office of the Recorder of Deeds; and, upon an objection being made to it, a certified copy of the said bond, was offered in evidence. It appeared, that one *John Findlay* was a subscribing witness to the execution of the bond, and that *John Findley* was the Recorder of Mercer county; but it did not appear from the Registry, that the bond was taken by *John Findlay*, the Recorder. The court overruled an objection made by the counsel for the defendants to this evidence, and an exception was taken to their opinion. This was the second error assigned.

Bankes, and *J. B. Foster*, for the plaintiffs in error.
Breedin, contra.

The opinion of the court was delivered by

DUNCAN, J. The principle in the foregoing case decides the question in this cause. This was an action on the official bond of *Allan Dunn*, the plaintiff in error, and his sureties, taken under the act of 1802; which gives the same remedy by action, in the name of the Commonwealth, for the use of each party aggrieved. In *Wolverton et al. v. The Commonwealth, for the use of Hart et al.*, 7 Serg. & Rawle, 275, it was decided, that this provision excludes all idea of there being but one judgment for the use of all concerned, as the foundation of a separate remedy for each by *scire facias*, adapted to the peculiar circumstances of the case; and it was so held in *Campbell and others v. The Commonwealth*, 8 Serg. & Rawle, 417. Besides, that act cuts up by the roots the objection made in *Shueffer v. Jack*; for it repeals in terms all former acts of assembly contrary thereto. The action was in the name of the Commonwealth, not stated to be for the use of any person aggrieved by the misconduct of the sheriff; and, after the jury was sworn, an amendment was granted, which was in effect the adding of new parties,—*Adams*, *Knox*, and *Nixon*;—for, if it was not, the addition of these names as parties to the suit, makes it the institution of a suit for their use. The action could not be supported in the name of the Commonwealth alone. This was not an amendment the court had authority to make, under any act of assembly. There is no act introducing a new name to an action by way of amendment, except in certain specified cases of trustees and assignees, by the act of the 24th of March, 1818. Courts cannot give a new and different action, under pretence of amendment;

Dunn and others v. The Commonwealth.)

whenever it has been done, so often has it been decided to be error. Much less can they introduce a new party. The writ, declaration, and action still stand in the name of the Commonwealth, and *Adams, Knox, and Nixon* could not come in under such action for their interests. The proceeding is, from first to last, erroneous. It was a prosecution different from that which the law has prescribed;—a remedy different from that which the law has substituted, in the place of one under the act of 1713, which had in experience been found to be inadequate, and which the legislature, therefore, had laid aside. In this there was clearly error. Any suitor who had any claim against the sheriff for misconduct, as well as *Adams, Knox, and Nixon*, might have moved for leave to assign breaches; and, as the record then stood, if the verdict was against the Commonwealth, to whom could the defendants look for costs?

It is not the duty of the court to notice further the errors assigned, as the judgment is reversed for the first, which cuts up this action by the roots, and no *venire de novo* will issue; but as the certified copy of the bond has been objected to, and as that is an objection which will probably occur in other actions, it has been thought advisable now to give an opinion on that point. This statutory evidence does not exclude the common law proof of the bond. It was introduced to save the trouble and expense, to every suitor, of procuring the bond from the office of the Secretary of the Commonwealth, and therefore the copy of the record was made evidence; but still the bond itself, its execution being established by common law proof, is binding. The record does not give it validity, but only makes the copy of the record of it evidence. But the bond was received without any proof of its being taken by the Recorder. It does not purport to have been taken by him. One *John Findlay* was a subscribing witness to the execution of the bond, as appeared by the paper, and it was in evidence that one *John Findlay* was the Recorder; but the registry does not state that it was taken by *John Findlay*, the Recorder. It would be as much evidence, if it wanted the name of any *John Findlay*, as a subscribing witness. Not that any one doubts that it was in fact taken by *John Findlay*, the Recorder; the presumptions are very strong that it must have been so; but *non constat* by any evidence known to the law, that such was the fact, *non constat* by the registry. On the plea of *non est factum* to a bond, all the judges and jurors may know it to be the handwriting of the defendant,—they may be willing to testify their knowledge of it,—still this is not legal evidence of its execution, there being a subscribing witness not called. The objection to the registry, and consequently to the certificate, is, that this is not officially noticed in the registry. There is no evidence of the execution of the bond, because it was not produced; nor any documentary evidence that this is the bond of the defendants, or taken by the Recorder. The

(Dunn and others v. The Commonwealth.)

exception is technical and very captious, but I am not able to give an answer to it. It can only occasion trouble and expense to the suitors, who can always obtain the proper proof. But where a defendant chooses to give this trouble, the court cannot dispense with the rules of evidence. This paper was improperly received in evidence,—it was not evidence on the plea of *non est factum*.
Judgment reversed.

[PITTSBURG, SEPTEMBER 19, 1826.]

LEIGHTY against The President, Managers, and Company of the Susquehanna and Waterford Turnpike Company.

IN ERROR.

Giving a promissory note for the sum required by the act of assembly of the 22d of February 1812, incorporating the President, &c. of The *Susquehanna* and *Waterford* Turnpike Company, to be paid in money, at the time of subscription, is not a payment of money within the meaning of the act.

WRIT of error to the Court of Common Pleas of *Crawford* county, in which a case was stated for the opinion of the court, to be considered as a special verdict.

The defendants in error were plaintiffs below.

CASE STATED.

“On the 3d of *August*, 1812, the defendant subscribed in the books of the above stated company, for eight shares of the stock of the said company, for which, at the time of subscription, he gave his note of hand to *James Herrington* and *Henry Hurst*, commissioners for obtaining subscriptions, for the sum of twenty-four dollars; being the three dollars per share required to be paid by the act of assembly at the time of subscribing. The note, and several instalments on the said stock, were afterwards paid by the defendant. The defendant afterwards subscribed for two other shares of stock in the said company, but on which nothing has at any time been paid. The action was brought to recover, as well the balance of the first, as the whole of the second subscription.”

The court below gave judgment for the plaintiffs.

The cause was argued in this court by *Selden* and *Wallace* for the plaintiff in error, who referred to the act of the 22d of February, 1812. *Pamph. Law*, 51. *Hibernia Turnpike Company v. Henderson*, 8 *Serg. & Rawle*, 219. And by

Derrickson, for the defendants in error, who cited, *Thatcher v. Dinsmore*, 5 *Mass. Rep.* 299. *Sheetz v. Mandeville*, 6 *Cranch*, 264.

(*Leighly v. The President, &c. of the Susquehanna and Waterford Turnpike Company.*)

PER CURIAM. This case falls within the principle established by the judgment in *The Hibernia Turnpike Company v. Henderson*, 8 *Serg. & Rawle*, 219, unless the giving of a promissory note for the sum which the act of assembly requires to be paid in money at the time of subscription, can be considered as the payment of money; and we are of opinion that it cannot. A promissory note is not money, but only an engagement to pay money at a future time, which perhaps may never be complied with. If such notes were to be taken as money, the policy of the law, which required a payment of money, might be easily defeated.

It is the opinion of the court, therefore, that the judgment should be reversed, and judgment entered for the plaintiff in error.

{ Judgment reversed, and judgment
 { entered for the plaintiff in error.

[PITTSBURG, SEPTEMBER 19, 1826.]

ESTEP and another *against* **HUTCHMAN** and others.

IN ERROR.

The record of a verdict for damages, to be released on the performance of a certain act by the defendant, where no motion for a new trial, or in arrest of judgment is made, but judgment is not entered on the verdict, in consequence of the performance of the required act by the defendant, is conclusive as to the same matters coming directly in question in another suit, upon the parties, and upon privies in blood, in estate, and in law, unless obtained by fraud and collusion.

A private act of assembly, authorizing the guardians of infant children, the title to whose real estate is vested in the guardians, to convey such estate to a person with whom the parent of the children, before his death, contracted to sell it, is valid.

A conveyance made by persons authorized by the legislature to convey, is *prima facie* evidence of good title in the vendee, against all claiming under the vendor; and, where such conveyance has been made after a solemn trial and decision on material facts, it is as conclusive as if made by a person in full life.

EJECTMENT in the Court of Common Pleas of *Westmoreland* county, the record of which was returned on a writ of error to this court, where six errors were assigned and argued, by *Foster* for the plaintiffs in error, and by *Coulter* and *Alexander* for the defendants in error. In delivering the opinion of the court, Judge **HUSTON** has rendered it unnecessary to state, in this place, either the errors assigned, or the circumstances out of which they arose.

HUSTON, J. This was an ejectment brought by the defendants in error, who were plaintiffs below, against *John Stouffer*, and

(Estep and another v. Hutchman.)

Clement Burleigh. *Burleigh*, who was the landlord of *Stouffer*, died, and his executors were substituted defendants. The plaintiffs, who claimed as heirs at law of one *Alexander M'Gready*, gave in evidence a title from the Commonwealth, which became vested in one *Marshal*, who entered into articles of agreement to convey five acres to *Alexander M'Gready*. *M'Gready* laid the property out in lots for a town, and called it *Mount Pleasant*. One of those lots was the subject of the present suit. *Alexander M'Gready* died before he received a deed from *Marshal*, and, on the 12th of *February*, 1807, a deed was made to *J. Edgar* and *J. Gallaway*, the guardians of *M'Gready's* children, in trust, &c.

The plaintiffs, after the above evidence, also read the deposition of *J. Edgar*, one of the guardians of *M'Gready's* children, which was rather in anticipation of the defendants' defence.

The defendants then gave evidence of a parol agreement between *Alexander M'Gready* and his brother *Patrick M'Gready*, by which the lot in question was sold to *Patrick* for forty dollars; that the brothers settled their accounts, and *Alexander* owed *Patrick* twenty dollars, which it was agreed should be considered as part payment of the lot. *Patrick* was to go as a hand on a voyage, which *Alexander* contemplated, to *New Orleans*, and the residue of the price was to be kept out of his pay. He did go as a hand; *Alexander* died down the river. The bargain was proved by other witnesses, to whom *Alexander* related it. There was a small cabin on the lot, and *Patrick* lived in the cabin at the time of the contract. There was an application to the legislature in *February*, 1807, immediately after the deed for the five acres had been made to the guardians of *M'Gready's* children; in which the guardians stated, that the title was in them, and that *Alexander M'Gready*, in his lifetime, had by parol contract agreed to sell sundry lots to different persons, naming them, of whom *Patrick M'Gready* was one; that he had received the whole, or part of the purchase money, &c., and praying the legislature to pass an act, authorizing them to convey the said lots. On the 7th of *April*, 1807, the act passed, authorizing them to convey the said lots to the persons who had contracted with *Alexander M'Gready*, and paid him, or should pay the guardians, or secure to them the payment of the money. See *S. Bio-ren's Acts*, 164, 165.

The defendants then gave in evidence the deed from *J. Edgar* and *J. Gallaway* to *Patrick M'Gready*, dated the 10th of *July*, 1809; and on the 19th of *July*, 1809, *Patrick* conveyed to *Clement Burleigh*.

John Edgar had stated in his deposition before mentioned, that *Clement Burleigh* had been very active in procuring depositions, &c., to accompany the petition to the legislature; that he, *Edgar*, had not understood that *Patrick M'Gready* alleged that he had paid the whole of the consideration money to his brother,

(Estep and another v. Hutchman and others.)

until after the act of assembly was obtained; and that he, *Edgar*, had refused to admit the fact that the money had been paid, and had refused to convey to *Patrick*.

To *March Term*, 1808, No. 37, *Patrick M'Gready* had brought a suit against *Edgar* and *Galloway*, the guardians, in which he stated the contract, the possession, and payment of the price, the act of assembly, &c., the refusal of the guardians to convey, &c., whereby action had accrued to him, &c. To this, the guardians, *Edgar* and *Galloway*, appeared and pleaded, so as that issues were joined on the facts of contract and of payment of the consideration. The cause was tried in *June*, 1809, and a verdict given for the plaintiff, which, when moulded into form, would be a verdict for the plaintiff for five hundred dollars damages, to be released on the defendants' executing a deed. I say the verdict might fairly be reduced to this. No motion for a new trial or in arrest of judgment was made. On the 10th of *July*, the guardians made a deed. At the next term, judgment was entered on the verdict. This was afterwards struck off by the court, on a receipt for the deed being produced, and no subsequent entry was made in the cause.

The defendants offered this record in evidence, which was objected to, rejected by the court, and a bill of exceptions taken.

Generally, the decision of a court of concurrent jurisdiction, on the matter in dispute, is as a plea or bar, and as evidence where it cannot be pleaded, (as in ejectment in this state,) conclusive between the same parties, upon the same matter coming directly in question.

If the guardians had doubts of the fairness of the allegation of *Patrick M'Gready*, they were right in requiring him to make out his case before a jury. Whenever parties are bound by a decision, so also are privies in blood, in estate, and in law. This trial was then on the very points now in dispute, before a competent tribunal, and between proper parties, and so far within the above rule.

But it is objected, there was no judgment on the verdict, and therefore the court were right in rejecting it. Where our jurisprudence compels us to attain the end of justice by different means, and through courts different from those in *England*, or the neighbouring states, we must adapt our decisions to our own modes of proceeding: If this state had a Court of Chancery, the application of *Patrick M'Gready* would have been to that court. The Chancellor might, and probably would, have directed the same points to be decided by a jury. On such a feigned issue, I believe a judgment would not be entered, but the facts found would be certified to the Chancellor, who would found his decree on that verdict, and decree a deed, and, in any future contest, such decree, and the previous proceedings, including the feigned issue, and verdict, would be evidence; and, unless proved to have

(Estep and another v. Hutchman and others.)

been obtained by fraud and collusion, conclusive. Instead of a suit in Chancery, and a decree, we have in this case an act vesting the power to convey in the guardians; and, instead of the feigned issue, a real one. No judgment entered, because the acquiescence of the guardians, and their execution of the deed rendered one unnecessary. And the want of a judgment of the court comes badly from those who prevented it by instantly conveying. On principle, then, I would consider this as what it was, in fact, a legal determination of the matter now contested, and which would be evidence for the guardians in a suit by the heirs against them; and is evidence for those claiming under *Patrick M'Gready*. It was once litigated, and determined by proper authority, and with proper parties, and ought not again to be disputed.

There was other evidence given, which it is not necessary to repeat. It would seem that every question now made had been decided by that verdict, and, unless that verdict is destroyed, by proving that it was obtained by fraud and collusion, which is not alleged, it would be difficult to find a reason for going beyond it.

Sundry exceptions were made to the charge of the court, about the precise meaning of which the counsel do not agree. If, as I incline to believe from the whole charge, the Court of Common Pleas was of opinion that the case was to be tried and decided, precisely as if the before-mentioned private act had never been passed, I do not agree with that court. One of the counsel has distinctly contended, that the legislature had no power to pass such a law. If such were the case, it would be very unfortunate, for we have many such acts, and property to an immense amount has been paid for, and is held under them. It is mistaking and mistating the question, to call this an act divesting those children of their estate. It may and does happen, that, from infancy, or idiocy there exists property, and no person has power to convey that property. Justice to other persons, as well as the best interests of infants or idiots, may require that a conveyance of it should be made. I know of no principle of public policy, or of law, of no provision of the constitution, which forbids the legislature to vest in some person the power to convey in such cases; but a law, giving such power to convey, would be worse than nugatory, if the conveyance, when made, was of no validity. A power to supply the want of trustees, to enable some person to complete defective titles, instead of, and for the use of infants, and others, must exist somewhere in every government. If not expressly given by the law or the constitution, it would seem to reside in that branch of our government which has usually exercised it. Even in *England*, an act of parliament is sometimes necessary to assist the almost unlimited power of a Chancellor. A conveyance made by persons, authorized by the legislature to convey, must then, it would seem, at least be *prima facie* evidence of good title in the vendee, against all claiming under the vendor. And where

(Estep and another v. Hutchman and others.)

such conveyance has, as in the present case, been made after a solemn trial and decision of certain material facts; such conveyance ought to conclude as much as a conveyance made by an owner in full life. In other words, as much as if *Alexander McGready* had been alive in 1809, and had himself executed the deed, as is directed by the act. Any other construction of this, or of similar acts would produce injustice and ruin of vast extent. Property of little value sold, and improvements of great value put on it; lots of forty or fifty dollars, rendered worth one or two thousand dollars by brick houses; minors supported by the price of the lots, or the debts of the deceased paid by them; a fair price at the time obtained and faithfully applied; all this is not to be unravelled and swept away by old cases, never adopted in this state, that the parol may demur in all cases affecting lands, nor by nice disquisitions on the powers of our legislature; which powers have been exercised from the commencement of the government, are beneficial, nay necessary; and cannot now be questioned, and, in my opinion, never could have been.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 26, 1826.]

ANDERSON and another *against* REYNOLDS.

IN ERROR.

Where the parties in replevin are at issue on the point of rent in arrear or not, the plaintiff cannot give in evidence a set off against his landlord.

WRIT of error to *Allegheny* county.

The cause was argued in this court, by *Burke* for the plaintiffs in error, who cited, 1 *Chitty on Pl.* 410, (margin, 562.) *Mont. on Set-off*, 18. *Bull. N. P.* 181. *Heck v. Shener*, 4 *Serg. & Rawle*, 257. *Act of the 26th of March, 1810*, *Purd. Dig.* 361. 2 *Str.* 763. *Watts v. Coffin*, 11 *Johns.* 495. *Workground v. Browne*, 4 *Harr. & M'Hen.* 89. *Shaw v. Atkinson*, 3 *Yeates*, 48. *Steigleman v. Jeffries*, 1 *Serg. & Rawle*, 477. *Gogel v. Jacoby*, 5 *Serg. & Rawle*, 117, 122. *Greenwalt v. Horner*, 6 *Serg. & Rawle*, 71.

Fetterman, for the defendant in error, referred to the *Act of 1705*, 1 *Sm. L.* 49. *Nicholson v. Hancock*, 4 *Hen. & Munf.* 491.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action of replevin, brought by *Reynolds*, the plaintiff below, against *Anderson* and *Gourley*,

(Anderson and another v. Reynolds.)

the plaintiffs in error. *Anderson* avowed for rent, and *Gourley* made cognizance as his bailiff; the plaintiff replied, "Nothing in arrear," and on that issue was joined. The plaintiff offered in evidence various services performed by him for *Anderson*, his landlord, and several articles sold and delivered to him, all which are specified in the several bills of exception taken on the trial. The defendants objected to all this evidence, but the court admitted it, on which exceptions were taken by the counsel for the defendants. The evidence might have been given to prove payment of the rent, the jury being instructed by the court that it would have amounted to a payment, provided the landlord had agreed to accept it as such, and not otherwise. But it appears clearly by the record, that the evidence was admitted, not as payment, but as a set-off, because the jury have found *a balance of thirty-two dollars and twenty-two cents due to the plaintiff, over and above the rent claimed by the defendant*; and this could only have been done in case of a set-off, under our act of assembly. It is true, that, on the argument in this court, the counsel for the plaintiff asserted that the evidence was offered and received, to prove payment of the rent. But that would make their case no better; for then the jury would have had no right to find a balance due to the plaintiff, and in so doing there was error. It is not my intention to give an opinion whether the plaintiff in replevin has a right of set-off against the landlord's claim of rent, provided it was pleaded, or notice given of it. In the case before us, the parties were at issue on the point of rent in arrear or not; in which the general right of set-off could not arise. The court has several cases of replevin under consideration, in which the law is unsettled, and the right of set-off may perhaps be involved, and that is the reason of my abstaining from an opinion at present. It is enough to say, that, under the state of the pleadings in this action, a set-off was inadmissible. The judgment is therefore reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 26, 1826.]

WELSH *against* CRAWFORD.

IN ERROR.

A sworn copy of the entries in a justice's docket, is admissible in evidence, with the same effect as the original, if produced, would have.

ON the trial of this cause in the Court of Common Pleas of *Mer-*
cer county, *William G. Welsh*, the plaintiff in error and defend-

(Welsh v. Crawford.)

ant below, offered in evidence the copies of two judgments rendered by *William Budd*, a justice of the peace, proved by the oath of the said *Budd* to be true copies of the proceedings in the suits in which the said judgments were rendered, as they are entered in his docket.

This evidence was rejected by the court, whereupon the defendant's counsel excepted to their opinion.

S. Foster, for the plaintiff in error, referred to *Stoever v. Whitman*, 6 Binn. 416.

Bankes and *Ayres*, contra, cited 7 Serg. & Rawle, 275. *Act of the 20th of March, 1810. Purd. Dig.* 356. 4 Serg. & Rawle, 300. 6 Serg. & Rawle, 20. 2 Binn. 47, 49. 2 Serg. & Rawle, 39.

The opinion of the court was delivered by

TILGHMAN, C. J. Justices of peace are ordered, by act of assembly, to keep a docket, and enter therein the proceedings in suits brought before them. These dockets are of a public nature, and ought to be kept in the office of the justice, where all persons may have access to them. The law considers them as almost equal to records; for, by the act of assembly of the 20th of March, 1810, section 16, *Purd. Dig.* 456, 5 Sm. L. 161, it is made the duty of every justice, in case of his resignation or removal from office, and of his legal representatives in case of his death, to deliver his docket to the nearest justice of the county: Provided, that if any justice who has resigned or been removed, or the legal representatives of a deceased justice, shall choose to retain the said docket, he or they shall, on demand, deliver a *certified transcript* of any judgment or proceedings in any suit therein, to the party or parties interested, under the penalty of one hundred dollars, &c.; and the justice to whom the said docket or transcript shall be delivered, shall issue process, and proceed thereon in the same manner, and with the like effect, as the said justice, so having died, resigned, or removed, might have done if he had remained in office. If nothing short of the original docket was evidence in courts of justice, great inconveniences might follow; because several persons might have occasion to give them in evidence, in different courts, at the same time. They fall within the rule of public books, which ought not to be removed, and of which, therefore, the law permits copies, proved by oath, to be evidence. It may sometimes happen, however, that a sight of the book itself may be necessary, in cases where there is suspicion of improper practices, by an alteration of the original entry; and, in such cases, the justice may be compelled to produce his docket by a *subpœna*, with a clause of "*duces tecum.*" There will be great convenience, therefore, and without any inconvenience, in admitting sworn copies of the entries in a justice's docket as evidence; to have the same effect as the originals, if produced, would have had. For these reasons, I am of opinion that

(Welsh v. Crawford.)

the evidence offered by the defendant ought to have been admitted, and, consequently, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 26, 1826.]

MILLER *against* DWILLING.

IN ERROR.

The child of a servant until the age of twenty-eight years, cannot be held to servitude for the same period, and on the same conditions as its mother, who was the daughter of a registered slave.

ERROR to *Washington* county.

This action, of *Homine replegiando*, in which *Alfred Dwilling*, the defendant in error, was plaintiff, and *John Miller*, the plaintiff in error, defendant, was entered in the Court of Common Pleas of *Washington* county, of *November* Term, 1824, to try the right of the defendant to hold the plaintiff as his servant, until he should attain the age of twenty-eight years.

On the trial, the President of the court, gave, among others, the following instructions to the jury, to which the counsel of the defendant below excepted:—

“The principal question, then, that is presented to us in this cause is, whether the child of a servant until twenty-eight years, can be held for the same period, and on the same conditions, as the mother? The children of those born during the term that their mothers, respectively, were lawfully held as servants, until they should arrive at the age of twenty-eight years, under the provisions of the Abolition Act of 1780, on account of their mothers having been slaves for life, in conformity to the existing laws of *Pennsylvania* at the passage of that act, were born free. The defendant, therefore, has no title to the servitude of the plaintiff, until he shall attain the age of twenty-eight years.”

Kennedy, for the plaintiff in error. Had it not been for the passage of the act of the first of *March*, 1780, 1 *Purd. Dig.* 478, the issue of a slave, would have been slaves *ad infinitum*. The object of the law was gradually to abolish *slavery for life*, but not to abolish servitude until the age of 28 years. This servitude was intended as a compensation to the master, who would be at the expense of supporting the child during infancy, and would lose a portion of the services of the mother during the time the child was very young. He cited, *Stiles v. Nelly*, 10 *Serg. & Rawle*, 366.

(Miller v. Dwilling.)

Baldwin, for the defendant in error. The act of the first of *March*, 1780, is loosely drawn, but enough appears to show the intent of the legislature to have been, to put an end to slavery absolute or qualified, except in relation to those who were then slaves, and their immediate issue. It has been decided, that the child of a female runaway slave from *Maryland*, begotten and born in *Pennsylvania*, is free, and yet that issue would have been a slave, if the act of 1780 had not passed. According to the opposite argument, servitude for life has been commuted to servitude for twenty-eight years, which is qualified, temporary slavery. But the act of 1780, sect. 10, expressly confines slavery to registered slaves, and declares that all others are *free*; and *ATLEE, J.*, in *The Commonwealth v. Betsy*, 1 *Dall.* 474, lays it down, that servitude for twenty-eight years is limited to the issue of registered slaves. Suppose a female slave were brought here from a neighbouring state and kept for more than six months; she becomes free; but if the doctrine contended for on the opposite side be correct, her issue would be servants until twenty-eight, because that issue would have been slaves, but for the act of 1780. This would scarcely be pretended, and is directly contradicted by authority. Again, it has never been contended that the child of an unregistered slave was a servant till twenty-eight, yet the issue of such slave would be a slave if the act of 1780, had never been passed. The servitude created by this law, is declared to be of the same nature as that of one bound by indenture for four years, and does not go beyond the immediate issue of a registered slave. Neither in the act of 1780 nor in that of 1788, is there any mention of the grandchildren of slaves. If hereditary servitude till the age of twenty-eight be preserved, slavery is not abolished, but remains in a qualified form for ever. *The Commonwealth v. Holloway*, 2 *Serg. & Rawle*, 305. *Wilson v. Belinda*, 3 *Serg. & Rawle* 397.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action of *Homine replegiando*, and the single question is, whether the child of a servant until the age of twenty-eight years, can be held for the same period, and on the same conditions as its mother, who was the daughter of a registered slave. It is a matter of importance, and has been very well argued. The case depends on the act for the gradual abolition of slavery, passed the 1st of *March*, 1780, and an act to explain and amend the same, passed the 29th of *March*, 1788. If the argument in favour of servitude be correct, the legislature of *Pennsylvania*, though it abolished slavery for life, established a kind of slavery, a servitude until the age of twenty-eight years, which may continue from generation to generation to the end of the world. This would be so contrary to the general spirit of the act of assembly, and of the time when it was passed, that it requires clear expressions to prove it. I will take a view of the act

(Miller v. Dwilling.)

of 1780, several clauses of which must be considered together, as they throw light on each other. By the third section, all persons, as well negroes and mulattoes as others, born thereafter, were to be deemed and considered not as servants for life, or slaves; and all servitude for life, or slavery of children in consequence of the slavery of their mothers, in the case of all children born within this state, after the passing of that act, was for ever abolished. The fourth section contains a provision, that every negro and mulatto child, born within this state after the passing of this act as aforesaid (*who would, in case this act had not been made, have been born a servant for years, or life, or a slave,*) shall be deemed to be, and shall be, by virtue of this act, the servant of such person, or his or her assigns, who would in such case have been entitled to the service of such child, until such child shall attain unto the age of twenty-eight years, *in the same manner, and on the same conditions whereon servants bound by indenture for four years are, or may be retained or holden;*” but, in case the person to whom the service of any such child shall belong, shall abandon his or her claim to the same, the overseers of the poor shall, by indenture, bind the said child out as an apprentice, for a time not exceeding the age of twenty-eight years. By the fifth section, every person who is, or shall be, the owner of any negro or mulatto slave or servant for life, or till the age of thirty-one years, now within this state, or his lawful attorney, shall, on or before the 1st day of *November* next, cause the said slave or servant to be registered in the manner therein prescribed, otherwise the said slave or servant, after the said first day of *November*, is not to be deemed a slave or servant for life, or till thirty-one years of age. By the tenth section, “no man or woman, of any nation or colour, *except the negroes and mulattoes, who shall be registered as aforesaid,* shall at any time hereafter be deemed, adjudged, or holden within the territories of this Commonwealth, as slaves or servants for life, *but as free men and free women,* except the domestic slaves attending upon members of congress, foreign ministers and consuls,” &c. &c. These are the points of the law most material to the present question, from which several principles may be deduced. 1st. That the legislature, anxious as it was to abolish slavery, thought it unjust to violate the right which every owner of a slave had to his service; and therefore every person who at the time of passing the act was a slave, was to remain a slave, unless his owner omitted to register him, on or before the 1st day of *November* next ensuing. 2d. That it was not supposed there could be a complete right of property in a person not in existence, and therefore as to the children of persons born after the passing of the act, there was no injustice in making such dispositions as should be judged expedient. 3d. That children born after the passing of the act were, (by the tenth section,) to be deemed *free*, because it is there declared, that all persons except the ne-

(Miller v. Dwilling.)

groes and mulattoes, *who are registered as aforesaid*, shall be deemed free, and none were ordered before to be registered, but those who were living, and slaves or servants for life, or till the age of thirty-one years, at the time of the passing of this act. 4th. That the children of those who were slaves or servants for life at the time of the passing of the act, born after the passing of the act, should be servants till the age of twenty-eight years, *in the manner, and on the conditions, whereon servants bound by indenture for four years might be retained or holden*. Now, from these different provisions, I think it follows, that it was not intended to impose a servitude till the age of twenty-eight years, on any except the child of a person who was a slave at the passing of the law. Such child was born free, subject to the said temporary servitude; and its issue could not be held to any servitude, unless it can be shown, (which has not been contended for,) that the issue of servants bound by indenture for four years were subject to servitude; for both were to be held *in the same manner, and on the same conditions*. But the counsel for the plaintiff in error relies on that part of the fourth section, by which it is provided that every negro and mulatto child born after the passing of the act, who would, in case the act had not been made, have been a servant for life or slave, was to be a servant till the age of twenty-eight years. To construe these words in their greatest extent, would lead to an extreme, which is confessed to be beyond the intent of the law. It was granted, that the child of a servant till the age of twenty-eight years, born after the mother's time of servitude expired, would not be subject to any servitude, and yet such child would have been a slave, if the act had not been made. So the child of a slave, who had absconded from another state, begotten and born in *Pennsylvania*, would be subject to servitude till the age of twenty-eight, contrary to the decision of this court in the case of *The Commonwealth v. Holloway*, 2 Serg. & Rawle, 305. So, if the owner abandoned the child, over which he had a right of service until the age of twenty-eight years, and such child was bound out by the overseers of the poor, and had issue, such issue would be liable to a servitude to the former owner of its parent, till the age of twenty-eight years. Other cases might be put, of the same nature, in which no one has ever conceived that a child was liable to servitude till the age of twenty-eight, although it would have been a slave, if the act of 1780 had not passed. It is clear, therefore, that the general expressions, "who would, in case this act had not been made, have been a servant for life, or slave," must be restrained and modified in such a manner as to answer the intent of the act, as it appears from an examination and comparison of its different parts. It may be remarked, besides, that the construction insisted on by the plaintiff in error, would in future times be attended with insuperable difficulty. If the operation of the law is confined to the children of persons who

(Miller v. Dwilling.)

were slaves on the 1st of *March*, 1780, it will be easy to know whether such children would been slaves, if the law had not been made. If the parent remained a slave when the child was born, it is certain that the child would have been a slave, if the law had not been made. But if the parent had been manumitted before the birth of the child, then the child would not have been a slave, although the law had not been made. But, in the case of a child to be born one hundred years hence, who can tell whether that child would have been a slave, if the act of 1780 had not been made? It would be impossible to ascertain that, because it would be impossible to know, whether, if slavery had not been abolished, one of the ancestors of such child might not have been manumitted, and then it would not have been a slave.

It was supposed, in the argument of this cause, that, inasmuch as the owner of a servant till the age of twenty-eight, would be subject to some loss of service of the parent, and great expense for the maintenance of the child, (in case such servant should have a child during its time of servitude,) that it was the intent of the law, to compensate the owner, by giving him the service of the child till the age of twenty-eight. But I do not feel the force of this argument; because the father of the child is bound to support it, if to be found, and able, but, if not, it may be given up to the overseers of the poor, who must provide for it; and for that purpose have authority to bind it out. I am aware that different constructions have been put upon the act of 1780, by gentlemen respectable for their learning. Some have held the opinion to which I incline; others the contrary. Neither will I undertake to say, that the subject is free from difficulties, the act not being drawn with such clearness as could be wished. But I think the meaning which I give to it is most agreeable to the general spirit, and well justified by the words of the law—that is to say, that no child can be held to servitude till the age of twenty-eight years, but one whose mother was a servant for life, or a slave at the time of its birth.

The judgment of the Court of Common Pleas is to be affirmed.
Judgment affirmed.

[PITTSBURG, SEPTEMBER 26, 1826.]

Case of the Road from the North end of Erie Street, in the
Borough of Mercer.

CERTIORARI.

The act of the 28th of *March*, 1814, erecting the town of *Mercer*, and the out lots belonging to it, into a borough, does not vest in the borough officers the power to lay out streets through the out lots, but leaves that power in the Court of Quarter Sessions.

CERTIORARI to the Quarter Sessions of *Mercer* county.

Bankes and *Ayres*, against the road.

S. B. Foster, for the road.

The opinion of the court was delivered by

TILGHMAN, C. J. This cause has been brought before us by a *certiorari* to the Court of Quarter Sessions for the county of *Mercer*, and it appears by the record, that an order was made by the said court, to lay out a public road through an out lot, containing about five acres, and included within the limits of the borough of *Mercer*. Whether the court had power to lay out this road, is the question. The town of *Mercer* was laid out, by virtue of an act passed the 24th of *March*, 1803, by certain persons named in the said act, who were thereby constituted trustees for the county of *Mercer*, and authorized to lay out the ground appropriated for the town, in *town lots* and *out lots*, in such manner, and with such streets, not more than one hundred, nor less than sixty feet wide, and with such lanes and alleys for public use, as they should direct. By the 5th section of this act, the trustees were required, as soon as may be, to file a return and draught of the survey, and of their proceedings, in the office of the Recorder of Deeds for the county of *Crawford*, or in the said office for the county of *Mercer*, if such office be then and there established by law. The trustees laid out the town and out lots and returned a draught of the survey, by which it appears that no streets were laid out through the out lots. They were continued to the line by which the town lots were bounded, and there stopped. The out lots contained from three to five acres each; that through which the road in question was laid out, contained about five acres, and was adjoining the town. By an act passed the twenty-eighth of *March*, 1814, the town of *Mercer* was erected into a borough, including the out lots. By the 4th section of this act, power was given to the burgess and assistants, chosen in the manner prescribed, or a majority of them, "to make such ordinances, rules and regulations, as may be necessary for *improving and keeping in order*, the streets, lanes, and alleys, within the said borough, and removing nuisances or obstructions therefrom; and also to assess, levy, and collect a tax for

(Case of the Road from the North end of Erie Street, in the Borough of Mercer.)

the said purposes," and they were vested with all other powers necessary for the well ordering and better improvement of the said borough. The Court of Quarter Sessions has the general power of laying out roads, and therefore may exercise that power over the out lots, unless prohibited by the last mentioned act of assembly. The borough officers had the express power of *improving and keeping in order*, the streets, lanes and alleys *already laid out*, but nothing is said of power to lay out streets through the out lots, nor can they have that power, unless it be given by the general authority to do such things as are necessary for the well ordering and better improvement of the borough. The authority conferred by these general expressions should not be pushed too far; and, as the subject of streets had been particularly adverted to, in a former part of this act, and the powers respecting them not extended so far as to lay out streets through the out lots, the safest construction will be, that this power was not vested in the officers of the borough, but left in the Court of Quarter Sessions. If it should be thought useful to take this power from the court, and vest it in the borough, the legislature will no doubt so order it. In the mean time, no inconvenience can arise, as the court can lay out such roads through the out lots as are necessary.

It is our opinion, that the proceedings in this case should be confirmed.

Proceedings confirmed.

[PITTSBURG, SEPTEMBER 26, 1826.]

HAMILTON against ASSLIN.

IN ERROR.

Parol evidence is admissible, to show that a particular clause was inserted in an article of agreement by mistake.

ON an appeal from the judgment of a justice of the peace to the Court of Common Pleas of *Allegheny* county, to which this was a writ of error, *William Asslin*, the defendant in error and plaintiff below, filed a declaration in covenant against *Samuel Hamilton*, the plaintiff in error, upon an article of agreement in these words:—

“An article of agreement, made by and between *Samuel Hamilton* of the one part, and *William Asslin* of the other part, both of *Allegheny* county. The said *Asslin* doth agree to make and finish one hundred thousand brick, the common size, to be good and sufficient; and said *Hamilton* is to find hands sufficient to attend in the making said brick, and said *Hamilton* to board said *Asslin*

(Hamilton v. Asslin.)

the time he is making said brick; and said *Hamilton* is to pay said *Asslin* the sum of one dollar twelve and a half cents per thousand, in current paper, at the time of payment; and said *Asslin* is to make a sufficient quantity of stock brick for the building, gratis, and no pay for them, and *Asslin* to help to build a shed, to make the brick, and said *Hamilton* is to pay said *Asslin* twelve and a half cents per thousand for digging the clay for the brick. In witness hereof we have set our hands and seals, this first day of April, 1819."

"*Samuel Hamilton*, (seal.)

"*William Asslin*, (seal.)

"Attest, *Noble Calhoon*."

On the trial, after the plaintiff below had given in evidence the agreement on which the action was brought, the defendant called *Noble Calhoon*, the subscribing witness to the agreement, and offered to prove by him that he drew the instrument, and that the clause therein, relating to the price of raising the clay, was inserted by mistake.

The plaintiff's counsel objected to the evidence; and the court sustained the objection; whereupon the defendant's counsel excepted to their opinion.

Fetterman and *Baldwin*, for the plaintiff in error, cited *Christ v. Diffenbach*, 1 Serg. & Rawle, 464. *M'Dermot v. United States Insurance Company*, 7 Serg. & Rawle, 604. *Drum v. Simpson*, 6 Binn. 482. *Thompson v. White*, 4 Dall. 426. *Dingle's Lessee, v. Marshall*, 3 Binn. 587.

Burke, for the defendant in error, referred to *M'Meen v. Owen*, 1 Yeates, 138. *Little v. Henderson*, 2 Yeates, 295. *Plankenhorn v. Ware*, *Id.* 270. *Mackey v. Brown*, 13 Serg. & Rawle, . *Powel on Cont.* 432. *Jackson v. Sill*, 11 Johns. 215. *Stevens v. Cooper*, 1 Johns. Ch. R. 425, 428. 4 Dall. 340. 3 Dall. 415. *Miller v. Henderson*, 10 Serg. & Rawle, 290.

The opinion of the court was delivered by

GIBSON, J. Courts of equity will rectify a mistake which has arisen from fraud or surprise, wherever the proof is clear, and I think no doubt can be entertained, that these articles would be reformed on a bill in equity. The plaintiff below agreed to make one hundred thousand bricks for the defendant, at the rate of a dollar and twelve and a half cents the thousand, the defendant finding the hands and boarding the plaintiff while he should be employed in the business. There is also a covenant, that the defendant should allow the plaintiff at the rate of twelve and a half cents for digging the clay, which he offered to prove by the scrivener, (who is also a subscribing witness,) was introduced into the articles by mistake. Notwithstanding the admitted danger and imperfection of parol evidences in all cases whatever, absolute

(Hamilton v. Asslin.)

necessity renders a resort to it, in most cases, indispensable. The very nature of fraud is such as to render detection by other means, impracticable; and as mistake is seldom manifest from intrinsic circumstances, this valuable head of chancery jurisdiction, without the evidence of those who might be able to speak directly to the fact would be of little use. Parol evidence has certainly been thought sufficient to ground a decree, by the ablest chancellor* that *England* ever produced. Here mistake is alleged in a distinct covenant, which may be expunged without disturbing any other part of the agreement; and, as the offer was to prove what would be a ground of relief in equity, the evidence ought to have been admitted.

Judgment reversed, and a *venire facias de novo* awarded.

* Lord THURLOW, in *Shelburn v. Inchiquin*, 1 Bro. C. C. 338, and *Stangroom v. the Marquis of Townsend*, 5 Ves. 328.

END OF SEPTEMBER TERM, 1826—WESTERN DISTRICT.

INDEX

TO

THE PRINCIPAL MATTERS.

ACCOUNT RENDER.

1. After a judgment *quod computet*, in account render, entered by confession, upon a declaration averring that the defendant was the plaintiff's bailiff and receiver during a certain specified period, the plaintiff cannot amend his declaration by laying a different period. *Sweigart v. Lowmarter.* 200
2. Nor can the plaintiff, on the trial of the issues certified by the auditors, give evidence of the receipt of money by the defendant, prior to the time laid in the declaration. *Ibid.*

ACKNOWLEDGMENT.

The acknowledgment of a deed by a feme covert is not good, unless it be expressed in the certificate of the magistrate who took her acknowledgment, that the contents of the deed were made known to her. *Steele v. Thompson.* 84

ACT OF ASSEMBLY.

A private act of assembly, authorizing the guardians of infant children, the title to whose real estate is vested in the guar-

dians, to convey such estate to a person with whom the parent of the children, before his death, had contracted to sell it, is valid. *Estep v. Hutchman.* 435

ACTION.

See ADMINISTRATOR. ASSIGNEES,
1, 2. OFFICIAL BOND, 1, 2.

1. The defendant having in his possession a quantity of coin, which he believed to be current money of *Cayenne*, offered to give it to the plaintiffs for goods. The plaintiffs, being ignorant of its value, asked time for inquiry, and having taken several days for that purpose, during which they satisfied themselves on the subject, delivered to the defendant a quantity of goods, for which they received the coin. After having kept it three years, they discovered that it was spurious, upon which they brought an action against the defendant for goods sold and delivered. There was no suggestion of fraud in the defendant, nor was any warranty alleged. *Held*, that the action could not be

supported. *Curcier et al. v. Pen-nock.* 51

2. Where the goods of a decedent, or the proceeds thereof in money, come into the hands of one who declares that he holds the property in trust for the children of the decedent, the children may, if all the debts of the decedent are paid, maintain a joint action against such person for money had and received, and recover the amount received by him, without having taken out letters of administration on the estate of the decedent. *Lee v. Gibbons.* 105
3. But if such person has acted unfairly, and wasted the property, the children can, *in this form of action*, recover no more than he has actually received. *Ibid.*

4. An action of debt will not lie on a judgment for damages, obtained under the act of the 6th of April, 1802, "to enable purchasers at sheriffs and coroners' sales to obtain possession." The remedy prescribed by the act can alone be pursued. *Moyer v. Kirby.* 162

ADMINISTRATION ACCOUNT.

See ADMINISTRATOR.

The settlement and confirmation of a partial administration account, do not preclude the court, on the settlement of a supplementary account, from inquiring into errors in the first account; particularly where minors are interested in the estate, who had no guardians when the first account was settled. *Case of McGrew's Appeal.* 396

ADMINISTRATOR.

1. An administrator cannot maintain an action against his co-administratrix, (who was the

widow of the intestate,) for money received by her beyond her share in her husband's estate, before a final settlement of the administration account, and while a balance remains in his hands due to the estate. *Steinman v. Saunderson.* 357

2. *It seems*, that after a final settlement of the administration account, and payment of the balance to those who are entitled to receive it, such an action may be maintained. *Ibid.*

AGENT.

1. A principal, who neglects promptly to disavow an act of his agent, who has transcended his authority, makes the act his own. *Bredin v. Dubarry.* 27
2. One who has only a parol authority for the purpose, cannot bind his principal by affixing, in his absence, his name and seal to a bond. *Gordon v. Bulkeley.* 331

AGREEMENT.

See AWARD, 3. CONTRACT. EVIDENCE, 18. LICENSE. WRIT OF ERROR.

1. *D. L.* being indebted on bond to the estate of his deceased father, *A. L.*, in order to pay that and other debts, entered into an agreement with the administrators of *A. L.*, by which it was stipulated, that he should sell to them the plantation on which he lived, together with the stock, and that they should sell the same to the best advantage, and apply the proceeds, in the first place, to the payment of the other debts of *D. L.*, and the residue, if any, to the extinguishment of his bond, "and if the plantation and stock brought more than settled the debts, including the bond, return the overplus to him; but if not enough, the administrators

were to be satisfied with what the property brought, and not call on *D. L.* for any more, hereafter." *Held*, that the sale of the plantation and stock, and the proceeds arising from them, were an extinguishment of the bond. *Hisa v. Lucas.* 209

2. On a sale of chattels, if the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such agreement, as respects creditors and the sheriff, is fraudulent; and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession, or not. *Martin v. Mathiott.* 214

AMENDMENT.

See ACCOUNT RENDER, 1. OFFICIAL BOND, 2.

APPEAL.

See ERROR, 12. RECOGNIZANCE.

A motion to dismiss an appeal from the judgment of a justice of the peace, on account of a defect in the recognizance of bail, must be made within a reasonable time; and if it be delayed nearly two years, it is to be presumed that the appellee waives all exceptions to the recognizance. *Shank v. Warfel.* 205

ARBITRATION.

See ERROR, 12.

ASSIGNEES.

1. Where the assignees of a debtor have sold the property, and received money enough to pay all the debts of the assignor, an action will lie against them, (if all have received the money, and all are equally liable,) to compel payment to a creditor,

whose claim against the assignor is established. *Rush v. Good.* 226

2. But whether an action can be supported for a proportion or rateable share of the debt claimed by the plaintiff, until he has proceeded against the assignees, so far as to have a dividend declared and distribution ordered, as directed by the act of the 24th of March, 1818, "to compel assignees to settle their accounts," &c. *quare?* *Ibid.*
3. A count against such assignees, setting forth the assignment, naming the defendants as trustees, and averring that they had collected money enough to pay all the debts of the assignor, may be joined with a count for money had and received, in which the defendants are not named as trustees; both counts charging them personally. *Ibid.*
4. But, under such a declaration, the plaintiff can only recover the money actually received by the defendants, and not what with due diligence they might have received. *Ibid.*
5. If several papers, purporting to be accounts of the assignees of a debtor, or some of them, be found together in the prothonotary's office, one of which papers purports to exhibit the property unsold, a second the property sold, a third the sums paid to the different creditors, a fourth the debts still due, &c., and they were all filed at the same time, they make together but one account; and if one of them be given in evidence against the assignees, it makes the others evidence for them; and this whether they are considered public or private papers. And if it be alleged, that one of the papers was made out since the commencement of the

suit, and this does not distinctly appear, the whole should go to the jury, with directions to disregard the one objected to, if they should be of opinion that it was not put in with the others, before the commencement of the suit. *Ibid.*

ASSIGNMENT.

See *INSOLVENT DEBTOR.*

Assignment by *B. B.* of all the effects of the late firm of *Y. and B., B. B. and Co.,* and of *B. B.,* in trust to pay such creditors of the late firm of *Y. and B.,* and of *B. B. and Co.,* as shall release all claims against the said late firm of *Y. and B.* and against the said *B. B. and Co.,* within a certain time, the plaintiff, a creditor of *B. B. and Co.,* executed a release within the time prescribed of all claims against the firm of *B. B. and Co.* *Held,* not to be conformable to the provisions of the assignment. *Sheepshanks et al. v. Cohen et al.* 35

ASSUMPSIT.

1. If, upon the execution of an assignment of a bond and mortgage under seal, and in the presence of two witnesses, which neither contains a guarantee of the sufficiency of the mortgaged premises and the solvency of the mortgagor, nor states that it is without recourse to the assignor, the assignor declare, that the mortgaged premises are worth double the sum for which they are mortgaged, that the mortgagor is solvent and able to pay the debt, and that if he should fail to do so, he, the assignor, will be accountable for it, and, upon being requested by the assignee to have the guarantee reduced to writing, he reply, that it is unne-

cessary, that there are witnesses present who can establish the fact, an action of *assumpsit* may be maintained by the assignee against the assignor upon this parol guarantee. *Overton v. Tracey.* 311

2. It is no objection to such an action, that no notice was given to the assignor of the failure of the mortgagor to pay the debt, or of the sale under the mortgage; unless it appear that the assignor was prejudiced by want of notice, or could have received any benefit from notice. *Ibid.*

ATTACHMENT, FOREIGN.

Appearance to a foreign attachment, entry of special bail to dissolve the attachment, and confession of judgment by the defendant for a smaller sum than the amount claimed, are not a waiver of the right of the defendant to maintain an action against the plaintiff in the attachment, for maliciously and wrongfully suing out a writ of foreign attachment against him, when he was not within the purview of the attachment laws. *Foster v. Sweeney.* 386

ATTORNEY AT LAW.

An attorney at law, on record, is authorized to do those things only which pertain to the conducting of the suit; and has no power to make a compromise by which land is to be taken instead of money. *Huston v. Mitchell.* 307

AUTHORITY.

See *AGENT.*

AWARD.

1. A writ of error does not lie on a decision of the court below, setting aside an award of

- referees, on exceptions founded both upon law and fact, though the award was set aside exclusively upon the points of law, without reference to the exceptions founded in fact. *Gratz v. Phillips.* 144
2. Whether an award shall be sent back to be corrected by the referees, is a matter which rests in the discretion of the court below, and in which this court has no right to control them. *Ibid.*
3. If several trustees, who have separately received money, agree to enter into an amicable reference, as defendants, and stipulate, "that no advantage shall be taken as to the form of suit, or the liability of the parties in it," an award against them *jointly* is good. *Ibid.*
4. In a *scire facias* against the heirs of A., and the tenants of lands which belonged to him, issued upon a judgment obtained against him in his lifetime, an award of arbitrators, under the act of the 20th of March, 1810, in favour of the plaintiff for a certain sum, "to be levied of the lands of A., deceased, or that descended to the heirs through or by virtue of him, the said A., deceased," is bad, for uncertainty. *Kitchen v. Funston.* 337
5. In an action against the commissioners of a township, an award of arbitrators, that the defendants shall pay to the plaintiffs a certain sum, "as soon as the defendants should be in possession of the township funds to do so," is uncertain and bad. *Williams v. Landon.* 338

BAILMENT.

1. A voluntary bailee, without reward, is responsible for the loss of the goods intrusted to him, only in cases of *gross ne-*

gligence. *Tompkins v. Saltmarsh.* 275

2. In an action against a voluntary bailee, for the loss of goods by carelessness and negligence, he may give in evidence his own acts and declarations, immediately before and after the loss, to repel the charge. *Ibid.*

3. But the defendant cannot himself be examined, to prove that the loss was not occasioned by his own neglect, carelessness, and mismanagement. *Ibid.*

BANKS.

1. The sureties in the official bond of a cashier of a bank, created under the act of assembly of 1814, the condition of which bond is, "that he shall well and truly perform the duties of cashier, to the best of his abilities," not only undertake for the fidelity and honesty of the principal, but also that he shall perform the office with competent skill and ability; and if he transcends the known powers of a cashier, by changing the securities of the bank without its knowledge, and loss has accrued by the abuse of his trust, the sureties are answerable for the loss. *Barrington v. The Bank of Washington.* 405
2. But, in such a case, the measure of damages is, not the amount of the debt lost, but the amount which might have been recovered, if the securities had remained unchanged; and this should be submitted to the jury upon the evidence. *Ibid.*
3. If no evidence be given of a written appointment of a cashier, evidence is admissible to show, that the person alleged to be cashier, acted as such in the various duties of that office; and though a resolution of the Board of Directors, directing the cashier to require certain

monies to be paid to him, at the banking house, on or before a certain day, is not evidence *per se*, yet, connected with other testimony, it is evidence of his appointment. *Ibid.*

4. *Query*, whether, if a bank has forfeited its charter, and is unable from the funds paid in to satisfy its debts, an *original subscriber*, who has transferred his stock, is a competent witness for the bank, to increase its funds? An *assignee* of bank stock is no further liable than as a stockholder. *Ibid.*

5. The entry in the book of minutes of a resolution of a certain number of directors, but not a competent number to make a board, that the name of one of the obligors in the cashier's official bond be struck out, provided the others agree thereto, is not evidence to show the consent of the other obligors to the alteration of the bond; but it is evidence to show that the bank was then in possession of the bond unaltered, and that the other obligors had not then consented to the alteration. *Ibid.*

BOND.

See AGENT. AGREEMENT. ERROR.
19. PAROL EVIDENCE. RASURE.

M., being the holder of a bond against *W.*, assigned it equitably to *B.*, who gave notice of the assignment to *W.*, the obligor, who acknowledged that it was a just bond, and promised to pay it, deducting certain credits to which he was entitled: It was agreed, that these credits should be adjusted between *B.* and *W.*, and *W.* was warned to pay no other person than *B.* At the time of the assignment, *B.* gave to *M.* a writing, stating that there appeared to be due to *M.*, on the bond,

two hundred and fifty-seven dollars, deducting one hundred and seventy-three dollars and fifty cents on *W.*'s account, *B.*'s account being also deducted. This writing *M.* assigned to *C.*, and ordered two hundred and fifty-seven dollars of the principal of the bond to be paid to *C.* It turned out that there was an error in the calculation, on which the writing given by *B.* to *W.* was founded, *W.* having paid to *M.*, before the assignment to *B.*, seventy dollars more than the writing stated. *W.* paid to *C.* the full sum of two hundred and fifty-seven dollars, (seventy dollars more than *M.* had a right to assign to him;) and, in an action on the bond, brought by *M.* for the use of *B.*, it was held, that *W.* was responsible to *B.* for this sum of seventy dollars paid to *C.* *Weaver v. McCorkle.* 304

CASHIER.

See BANKS, 1, 2, 3.

CHALLENGE.

See JUROR.

COIN.

See ACTION, 1.

CONNECTICUT TITLE.

It is not an infraction of the law, for a person holding the *Pennsylvania* title, to agree with a settler under a *Connecticut* title, for the surrender of his possession, on paying to him a compensation for his improvements, buildings, and crop in the ground; and where the fact, whether the contract was for the purchase of the possession and improvements, or of the title to the land, depends, as well upon other evidence, as upon writings, it is proper to submit the question to the de-

cision of the jury. *Overton v. Tracey.* 311

CONTRACT.

See EVIDENCE, 18. ERROR, 15.
Plaintiff sold to defendant certain goods; some time after which, the clerk of the plaintiff, who, it was admitted, had authority to give receipts for him, gave to defendant a receipt as follows: "Received, *August 20th*, 1816, of *J. B.*, seventy-three dollars and eighty-two cents, which, with goods, &c. returned, *will be in full*, and interest account to be adjusted between *Mr. D.* and the said *J. B.*" Held, that, in the absence of evidence to the contrary, the agreement was, that the goods should be returned, and the original contract of sale, *pro tanto* rescinded. *Bredin v. Dugarry.* 27

CONVEYANCE.

See ACT OF ASSEMBLY. EVIDENCE, 29.

COSTS.

1. When this court reverses a judgment, and orders a *venire facias de novo*, it has a right to impose terms as to costs. But, where no terms are imposed, all the costs abide the final event of the suit. *Work v. Lessee of Maclay.* 265
2. On an award of arbitrators in trespass *quare clausum fregit*, in favour of the plaintiff, for one dollar and the costs of suit, the plaintiff is entitled to full costs. *Wilkinson v. Grey.* 345

COURTS.

See COURTS OF COMMON PLEAS.
SPECIAL COURT.

COURTS OF COMMON PLEAS.

See JUDGMENT, 11.

The Courts of Common Pleas have power to entertain a motion. VOL. XIV.

tion to strike off or open a judgment, or to order a feigned issue for the purpose of ascertaining necessary facts. *Kellogg v. Krauser.* 137

COVERTURE.

See PLEADING, 1, 2.

DAMAGES.

See BANKS, 1, 2.

DECLARATION.

See ASSIGNEES, 3, 4.

DEED.

The vendee of a tract of land, to whom a deed has been executed, and who has given a bond and mortgage for the purchase money, is presumed, in the absence of evidence to the contrary, to have accepted the deed; and, in an action on the bond, he is not entitled to an abatement, on account of a small deficiency afterwards discovered in the quantity of land conveyed. *McDowell v. Cooper.* 296

DEFALCATION.

See SET-OFF.

Where the assignee of a promissory note, drawn payable *without defalcation*, takes it with full notice of a right of defalcation, attended with circumstances of strong equity, arising between the drawer and payee subsequent to the date of the note, he takes it, (at least if the payee was insolvent at the time of the assignment,) subject to such right of defalcation. *Lighty v. Brenner.* 127

DEFICIENCY.

See DEED.

DEPOSITION.

See EVIDENCE, 24.

DEVISE.

See ESTATE FOR LIFE.

1. Devise to three daughters during their lives, respectively, by metes and bounds. "Item, it is my will, that if any of my daughters die without lawful issue, or if having issue, and such issue all die in their minority, without leaving lawful issue, then I give the land and premises so to them before allotted to my other child or children's lawful issue, as tenants in common, to hold to them, their heirs or assigns for ever." One daughter died before the testator; the others survived, and one of them married and had two children, and then with her husband conveyed an interest in the share of the deceased daughter, claiming to hold by the father's intestacy as to it. *Held*, that it passed no title. *Way et al. v. Gest et Ux.* 40
2. Testator, after a bequest of certain personal property, devised to his wife *C.*, and his daughter *A.*, and any other child or children he might have at the time of his decease, their heirs and assigns for ever, in equal shares, all his other estate and property, real and personal; and, in the event of the death of either, the share of the party dying, to go over to the survivor or survivors, in fee simple; but should his children, or either of them die without issue, such issue to stand in the place of his, her, or their deceased parent. He appointed his wife *C.* executrix, and *J. W.*, jr., executor, with power to sell the real estate. The testator left his widow *C.*, his daughter *A.*, and a son *B.*, born after his death, who died in his infancy, leaving no issue. *J. W.*, jr., alone proved the will, but both he and the executrix joined in the sale of the real estate, for which they jointly

gave deeds, and received securities in their joint names for the part of the purchase money which remained unpaid. *J. W.*, jr., had in his hands, as executor, personal property, money, or securities for money, arising from the sale of the real estate, rents and profits received from the real estate, and interest or income of the personal property, and proceeds of the real estate. *Held*, that the widow, *C.*, took an indefeasible estate in fee simple in one third; the children, *A.* and *B.*, a defeasible one, and, upon the death of either of the children without issue, the estate went over to the survivor by way of executory devise, and, consequently, on the death of *B.* without issue, the whole fee simple in the two thirds vested in *A.* And that the husband of the widow was entitled, in her right, to one third part of the proceeds of sale, and the guardian of the daughter to the other two thirds; and that where the money had not been received, they had a right to call upon the executor to proceed to recover the money due on the securities, or to assign them to the several plaintiffs, in proportion to their rights. *Lippencott v. Warder.* 115

DISTRESS.

See TRESPASS, 1.

EJECTMENT.

See ERROR, 14. EVIDENCE, 19. INSOLVENT DEBTOR, 4. WARRANT AND SURVEY.

1. Where defendants in ejectment come into possession as tenants of the person as whose property the land in dispute was sold by the sheriff, under a judgment confessed by him, they

cannot set up, as a defence, a mortgage and release of the equity of redemption, given to one of them by the defendant in the judgment. *Eisenhart v Slaymaker*. 153

2. One verdict and judgment, and one award of arbitrators, under the act of the 20th of March, 1810, in favour of the same party, are not a bar to another ejectment by the other party. *Ives v. Leet*. 301

3. If the plaintiff in ejectment, claims both on an original title and by virtue of a lease from him to the defendant, it is competent to the defendant to defend on both grounds; and it is error in the court to assume the existence of the lease, and prohibit the defendant from showing that the title is not in the plaintiff, but a third person. *Miller v. M^r Brier*. 382

4. A tenant may impeach his landlord's title, whenever he can show that he was induced to take a lease by misrepresentation and fraud. *Ibid*.
5. An agreement, by a person in possession of land, to abandon the premises at a certain day, is not a lease, and does not estop him from controverting the title of the person with whom the agreement was made. *Ibid*.

EQUITY.

See LICENSE. TRUST.

ERROR.

See EJECTMENT, 3. EVIDENCE, 5, 8.
INDICTMENT. JUDGMENT, 4, 10.
SPECIAL COURT.

1. This court will not reverse a judgment entered by confession in the court below, in an action of debt, because no declaration has been filed. *Moyer v. Kirby*. 162
2. But where the suit is com-

menced by writ, an appearance entered, a plea put in, a judgment confessed, and the plaintiff, after judgment, by leave of the court, files a declaration, *nunc pro tunc*, the judgment will be reversed, if the declaration sets forth no cause of action. *Ibid*.

3. If, in a suit on a bond given to two persons as administrators, the instrument declared upon correspond with that given in evidence, but the declaration state it to have been assigned by both obligees, when in fact it appears to have been assigned by one only, this is not a variance for which the judgment will be reversed. *Wilson v. Irwin*. 176
4. This court will not reverse a judgment, except for error apparent on the record. *Munderbach v. Lutz's Administrator*. 220
5. If any presumption be admitted, it will be rather to support, than to reverse a judgment. *Ibid*.
6. The omission to instruct the jury on a point, which the verdict has rendered immaterial, is not error. *Ibid*.
7. It is not necessary for the court to answer a proposition submitted for their opinion in the very words of the proposition. It is enough, if the answer be sufficiently full to be understood. *Ibid*.
8. If a proposition submitted by the counsel to the court, be a mere repetition, in other words, of one which has already been answered, it is not error to refer to the answer already given, or even to omit to answer the proposition altogether; and if it be alleged, that the second proposition is different from the first, it is the duty of the counsel to place the first on the record. *Ibid*.

9. If the counsel of the defendant select that part of the testimony on which he relies, and request the court to instruct the jury that it is a full defence to the plaintiff's claim, and the court, who had previously stated the whole evidence in the case, in their charge, say, "The proposition is correct, and if the jury believe the facts on which it is founded, as stated before in the charge, it is a bar to the plaintiff's recovery," this cannot be assigned as error by the plaintiff. *Ibid.*
10. This court will not reverse a judgment, where a point is stated fairly by the court below, but not so fully as it might be stated. *Ibid.*
11. Nor will it reverse a judgment, because the court below has answered an abstract proposition, which this court may think ought to have been omitted; especially, if the answer be correct. *Ibid.*
12. If one of several defendants enter a rule of arbitration for himself and his co-defendants, but without any authority from them appearing, and, upon an award against them, enter an appeal, representing himself in the same character, after which the cause is tried, and a verdict and judgment given against the defendants, this cannot be taken notice of by this court as error. The cause must be considered as legally in court, unless some one of the defendants should come and deny the right of appealing for him, and support his denial at least by his own affidavit. *Rush v. Good.* 226
13. If the record state, that the court below instructed the jury as the plaintiff in error requested, without setting forth particularly what the instructions were, it is not error. *Bitzer's Executors v. Hahn.* 232
14. In ejectment, under the act of the 21st of March, 1806, judgment by default, at the first term, is irregular. *Vanderslice v. Garven.* 273
15. If to the proposition, that parties are bound by their own construction of a contract at the time it is finally executed, the court answer, that the proposition is generally true, but that fraud is alleged, and, if found by the jury, the written evidence in relation to the contract is not conclusive, it is not error. *Frederick v. Campbell.* 293
16. In the following instructions to the jury, held, that there was not error, viz. "If the warrant on which the plaintiff's survey was executed, was vague and indescriptive, it ought to have been returned in a reasonable time, or a sufficient reason given for the delay. Here is a survey on a loose warrant, not returned by the officer to whom it was directed, but, nearly ten years afterwards, certified by his successor, on the representation of the plaintiff himself, that there were no interfering claims, although, from his letter to Dr. Smith, he knew there were, and also knew that the land was settled upon by the present defendant. It appears, further, that he had relinquished his claim under the survey to Dr. Smith, and had declared to others he had no claim to any land on that side of the creek where that survey lies. If you believe all this, the survey ought not to attach, until actual return into the office; and, in that case, it gives no right to the land in question, if, as is the undisputed fact, the defendants had, six or se-

- ven years before the return and acceptance of the plaintiff's survey, entered upon the land as vacant, and, by actual residence and substantial improvements, acquired an equitable title." *Vickroy v. Shelley*. 372
17. Upon the following proposition, viz. "The survey of *H. R.*, if a shifted survey, is to be considered as subsequent to the survey of *R. I.*, not being returned before the *bona fide* survey of the plaintiff," the court below charged, "The survey on *H. R.*'s warrant, if a shifted warrant, (but of which there is no satisfactory evidence,) would give no title until actual return. But whether the plaintiff's warrant be, what the question presupposes, a *bona fide* one, and prosecuted with due diligence, is submitted to the jury on the evidence before them." *Held*, that in this charge there was no error. *Ibid*.
18. In considering the charge of the court below, a detached part of it is not to be taken, without reference to other parts, and to the facts proved in the cause; and if, from the *whole* charge, it appear that the court instructed the jury rightly in point of law, the judgment will not be reversed, even if the court below was mistaken in its opinion as to the facts. *Kerr v. Sharp*. 399
19. If, in an action on a bond with a condition, the defendant plead *non est factum* and performance of the condition, and, on the eve of trial, receive from the plaintiff, instead of a regular assignment of breaches, an informal specification of them, and go to trial on the merits, this amounts to an agreement of the parties to waive irregularities in the pleadings; and, consequently, this court will

not reverse the judgment, because the cause was tried without having been regularly put to issue. *Barrington v. The Bank of Washington*. 405

ESTATE FOR LIFE.

Testator devised as follows: "As touching all my worldly substance with which it hath pleased God in this life to bless me, I give, bequeath, and dispose of the same as follows: *I make over and bequeath to my son George, the plantation I now live on, which hath two deeds.*" He then gave and bequeathed to his son *John* another plantation, and a third to two of his daughters, and to his other daughters he gave money legacies. The personal estate he directed to be kept together, to maintain and school the children, as formerly, till *George* came of age, when it was to be divided into three parts, one of which was to go to his wife, and the other two to his two sons, *George* and *John*. And after *George* came of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow. *Held*, that *George* took only an estate for life. *Steele v. Thompson*. 84

EVIDENCE.

ACCOUNT RENDER, 2. ASSIGNEES, 5. BAILMENT, 2, 3. BANKS, 3, 4, 5. ERROR, 3. INSOLVENT DEBTOR, 2. JUDGMENT, 5. JUSTICE OF THE PEACE. LEADING QUESTIONS. OFFICIAL BOND, 3. PAROL EVIDENCE. RASURE, 1, 2. SET-OFF. SETTLEMENT, 3. WITNESS.

1. In an action by the assignee of a promissory note against the drawer, the defendant cannot, under the plea of payment, give in evidence declarations made by the assignor, before the assignment, "that he would fix

- the drawer," &c., if no notice has been given by the plaintiff that such declarations would be offered in evidence. *Lighty v. Brenner.* 127
2. In a feigned issue, to try whether a judgment which had been assigned to the plaintiffs, is a lien upon the lands of the defendant, declarations by the assignor, made before the assignment, that a few days after the entry of the judgment, and when its entry was unknown to the defendant, he had paid to the assignor three hundred dollars, in consideration of which the latter had agreed not to enter the judgment, may be given in evidence by the defendant. *Kellogg v. Krauser.* 137
 3. Though the opinion of a witness, as to the value of land, is not strictly a fact, yet he may be asked what was the value of certain mortgaged premises, in the possession of the defendant, at the time the judgment was entered against him, on the bond accompanying the mortgage. *Ibid.*
 4. On the trial of a cause in the Court of Common Pleas, the original records of that court, removed to the Supreme Court on a writ of error, and there remaining, may be given in evidence. The docket entries of the Court of Common Pleas may also be given in evidence, after the records have been removed. *Eisenhart v. Slaymaker.* 153
 5. The order of giving evidence is at the discretion of the court before which the cause is tried, and is not the subject of a writ of error. It therefore is not error to permit a judgment and the proceedings thereon, under which the plaintiff in ejectment claims, to be given in evidence, without previously showing some colour of title in the defendant in the judgment, if it appear subsequently that the defendant in the judgment came into possession under the defendant in the judgment. *Ibid.*
 6. A copy of a notice to quit is competent evidence, without notice to produce the original. *Ibid.*
 7. Where the defendant neglects to give the notice of special matter required by a rule of court, the admission of other evidence, without objection by the plaintiff, will not entitle the defendant to give in evidence, that of which he ought to have given notice. *Wilson v. Irwin.* 176
 8. Nor can he, by setting out in the form of a plea of set-off, the special matter which he might have given in evidence under the plea of payment with leave, &c., if notice had been given, either give such special matter in evidence or entitle himself to a continuance. It is not error to refuse such a plea to be added. *Ibid.*
 9. Evidence that a horse was received by the defendant in exchange for a patent right, is not admissible, either under a count for money paid, laid out, and expended, or for money had and received. *Doebler v. Fisher.* 179
 10. In an action on a promissory note against the administrator of the drawer, the defendant may, under the plea of payment with leave to give the special matter in evidence, prove that as administrator he had assigned to the plaintiff the note of a third person, of greater amount than the claim of the plaintiff, and that the amount of the note thus assigned, had been paid to the plaintiff. *Bailey v. Bailey.* 195
 11. Where, in an action against

- an administrator, on a promissory note of the intestate, none of the pleas deny that the defendant has personal assets to satisfy the plaintiff's claim, the defendant cannot give in evidence a record of the Orphans' Court, showing that on a valuation and appraisement of the real estate of the intestate, the plaintiff, who was his brother, took it at the appraisement, giving security to the other heirs. *Ibid.*
12. A printed advertisement is not admissible in evidence, where it appears from the testimony of a witness, that the original manuscript from which it was copied was given to him, and that he had left it with the printer of a newspaper, by whom it was published; that he had not inquired for it of the printer, and had made no particular search for it among his papers, but that he believed it to be lost. *Sweigart v. Lowmarter.* 200
13. In an action on a bond, given for the purchase money of a tract of land, the defendant may, under the plea of payment and notice of special matter, prove that while he was treating for the purchase, the plaintiff showed him, as the boundaries, lines which were afterwards found not to be the boundaries of the land conveyed, and that the lines designated in the conveyance excluded the land which was shown to him as part of the tract. *Stubbs v. King.* 206
14. After the plaintiff has given in evidence his book of original entries, and a letter from the defendant, acknowledging the receipt of several letters from the plaintiff, but without mentioning their contents, state his inability to pay the balance due to the plaintiff, and asking further time, the plaintiff cannot give in evidence his journal and ledger, to show what was the balance due. *Worman v. Boyer.* 212
15. A receipt, signed in the name of the plaintiffs, by a brother-in-law of one of them, who lived near them, was often in their store, and in habits of intimacy with them, is not admissible in evidence. *Ibid.*
16. If a notice to produce papers be not complied with, copies of the papers may be read, or their contents proved; but the court has no power to require their production under the act of the 27th of February, 1798. *Ibid.*
17. In an action on a single bill, the defendant may, under the plea of payment, with notice of special matter, prove that the bill was taken, subject to a parol agreement made long before its date. *Lyon v. The Huntingdon Bank.* 283
18. In an action on a bond given for the price of a tract of land, which by articles of agreement the plaintiff had contracted to sell to the defendant, and was said to contain two hundred and twenty-five acres, and for which a deed was afterwards executed, conveying the tract by metes and bounds, and calling it two hundred and twenty-five acres, but it turned out to be deficient in quantity, the defendant may prove, that, at the execution of the articles of agreement, the plaintiff asserted that the tract would be found to contain two hundred and twenty-five acres, and called on the by-standers to witness that he would make his assertion good. *Frederick v. Campbell.* 293
19. In ejectment, the defendant may give in evidence the declarations and acts of the plaintiff,

tending to prove that he had made a parol sale of his interest in the land in dispute, accompanied by payment of the purchase money and delivery of the possession. *Clarke v. Van-kirk.* 354

20. Where, in slander, the words laid are, that the defendant said that the plaintiff had *stolen* property; and the witnesses offered by the plaintiff can only testify, that the defendant said that the plaintiff had either *taken* or *stolen* it, without being able to say which expression was used, the court ought to receive the evidence, and leave it to the jury to determine, from the sense of the whole conversation, which expression was used. *M^cAlmont v. M^cClelland.* 359

21. A repetition of the charge, after suit brought, may be given in evidence, to show malice, in an action of slander. *Ibid.*

22. In slander, evidence is admissible to prove the defendant's situation in point of property. *Ibid.*

23. A paper, containing the draught of a survey, and a copy of field notes, endorsed, "*Fees paid T. V.,*" and "*sent to Mr. O'K., deputy surveyor of Cambria county, December 8th, 1807—J. A., D. S. B. C.,*" which *I. P.*, the deputy surveyor of *Cambria* county, proved had been returned to him by *W. O'K.*, the former deputy surveyor of the said county; that the words, "*Fees paid,*" appeared to him to be the hand-writing of *G. W.*, formerly deputy surveyor of *Bedford* county, but the witness never saw him write, and knew his hand-writing only by comparison, and that the rest of the indorsement was in the hand-writing of *J. A.*, formerly deputy surveyor of *Bedford* county,

who certified that he sent it to *O'K.*, but did not say where he found it, or that it had ever been in the office of the deputy surveyor of *Bedford* county, is not evidence. *Vickroy v. Shelley,* 372

24. If notice be given, that a deposition will be taken at a certain house in the township of *N.*, in the county of *B.*, and nothing more appears than that it was taken in the county of *B.*, it cannot be read in evidence, unless the adverse party attended, which cures the defect. *Ibid.*

25. A connected draught of eleven tracts of land, which came from the office of the surveyor general, by whom it was certified, that "*it was a connected draught of eleven tracts of land, situate on the waters of Otter Creek, and surveyed on warrants granted to the persons whose names are written on the plots respectively, all dated the 23d of July, 1773, except that to R. I., which is dated the 22d of July, 1794,*" is not evidence to make title to the land in dispute; but it is evidence to show that the survey, under which the plaintiff claimed, did not interfere with others. *Ibid.*

26. In ejectment, the plaintiff made title to No. 1028, in the Fifth Donation District, and the dispute being about its locality, after having examined several witnesses, the object of whose testimony was to prove that the tract in possession of the defendant was No. 1028, offered in evidence the record of an ejectment brought by one *M.* against the plaintiff, and the recovery of another tract of land, on which the plaintiff lived, and claimed as No. 1028: *held*, that the record was not evidence of any particular right.

- But evidence having been given on the cross-examination of one of the plaintiff's witnesses, of the plaintiff's residence on the land which *M.* recovered from him, and that he continued in possession of that tract as No. 1028, and the witness having testified, that as far as he knew, he had lived there ever since, and that he understood he was the tenant of *M.*: *held*, that the record became evidence for the purpose of explaining what had become of his possession of *M.*'s tract, and that he had by mistake seated himself upon it as No. 1028. *Moore v. Smith.* 388
27. After the sale of part of a tract of land to one who holds in severalty the part sold, the declarations of the vendor, in a dispute with a third person, are not evidence to affect the rights of the vendee. In order to affect a person by conversations or declarations made in his presence, they must be made to him in such a manner as requires him to deny, or, by his acquiescence, to admit them. Therefore where *A.*, who claimed a tract of land, attended as chain-bearer, a jury of view, in a controversy between *B.* and *C.*, conversations between *B.* and *C.* relative to the locality of the tract claimed by *A.* are not evidence against him. *Ibid.*
28. The record of a verdict for damages, to be released on the performance of a certain act by the defendant, where no motion for a new trial, or in arrest of judgment is made, but judgment is not entered on the verdict, in consequence of the performance of the required act by the defendant, is conclusive as to the same matters coming directly in question in another suit, upon the parties, and upon privies in blood, in estate, and in law, unless obtained by fraud and collusion. *Estep v. Hutchinson.* 435
29. A conveyance made by persons authorized by the legislature to convey, is *prima facie* evidence of good title in the vendee, against all claiming under the vendor; and, where such conveyance has been made after a solemn trial and decision on material facts, it is as conclusive as if made by a person in full life. *Ibid.*
30. A sworn copy of the entries in a justice's docket, is admissible in evidence, with the same effect as the original, if produced, would have. *Welsh v. Crawford.* 440
- FAIRMOUNT.**
See SCHUYLKILL, RIVER.
- FEIGNED ISSUE.**
See JUDGMENT, 5. NOTICE.
A feigned issue is to inform the conscience of the court as to disputed facts, and is to be moulded as their discretion dictates. And the mode in which it is done by the court below is not the subject of a writ of error, and cannot be judicially decided on by this court. *Neff v. Barr.* 166
- FISHERY.**
See SCHUYLKILL NAVIGATION COMPANY, 2. SCHUYLKILL RIVER. RIVERS, 1.
- FRAUD.**
See AGREEMENT, 2. EJECTMENT, 4. ERROR, 15.
- FUNERAL EXPENSES.**
Of the proper allowance for funeral expenses. *Case of M^r Glinsey's Appeal.* 64
- GUARANTEE.**
See ASSUMPSIT. LIMITATIONS, ACT OF, 2.
- VOL. XIV. 3 N

B. being indebted to *C.*, and *J.* to *B.*, and *J.* having a judgment against *L.*, an arrangement was made between *C.*, *B.*, and *J.*, in pursuance of which *J.* assigned his judgment against *L.* to *C.*, and *B.* delivered up to *J.* one of his bonds to him, and indorsed a receipt on another of his bonds for a sum amounting to the difference between the bond delivered up, and the judgment against *L.*, assigned by *J.* to *C.*; *J.* having refused to assign the judgment, unless this was done. There was no written guarantee of the assigned judgment, nor any express promise by *J.*, either to *B.* or to *C.*, that, in case the money could not be recovered from *L.*, he would be responsible. *L.* proved insolvent, in consequence of which *C.* brought suit against *J.* *Held*, that the law raised no duty from *J.* to *C.*, by which the suit could be supported. *Jackson v. Crawford.* 290

HAWKER AND PEDLAR.

A hawker and pedlar, who goes from house to house in an incorporated or county town, offering for sale goods prohibited by the act of the 28th of *March*, 1799, and sells any one article, even of trifling value, incurs the penalty of fifty dollars, imposed by that act. And a license obtained under the act of the 4th of *March*, 1824, does not protect him. *Commonwealth v. Willis.* 398

HUSBAND AND WIFE.

1. Where the wife permits her husband to receive the rents of an estate, conveyed in trust for her separate use, by the husband, after marriage; where they live together, and the rents are generally laid out by the husband, together with his own

money, in the purchase of goods for a store kept in the name of the wife, in their dwelling-house, and, on his dying intestate, the wife, as his administratrix, accounts for the goods in the store as his, she is not entitled, on the settlement of her administration account, to retain, against the estate of her husband, the amount of the rents received by him. *Case of M^r Glinsey's Appeal.* 64

INDICTMENT.

Unless it appear on the face of an indictment for burglary, *what judgment* was given on a former indictment for the same offence, it is error to sentence the defendant to imprisonment at hard labour during life. It is not enough if the indictment state that the defendant was *convicted* on the former indictment, and that the court gave *judgment*. *Smith v. The Commonwealth.* 69

INSOLVENT DEBTOR.

1. The property of an insolvent debtor passes to his trustees immediately on his assignment, and all the world is bound to take notice of it. Consequently, a payment to the debtor, the day after his assignment, by one who has not actual notice of it, is not valid. *Wickersham v. Nicholson.* 118
2. The record of the discharge of an insolvent debtor, is conclusive as to the fact of his having complied with all things required by law to entitle him to a discharge; and cannot be inquired into in a collateral action. *Sheets v. Hawk.* 173
3. It is not a forfeiture of the bond given by an insolvent debtor to the arresting creditor, under the act of the 28th of *March*, 1820, if the record merely show that the debtor appeared and presented his petition at the time

appointed, that the court appointed the first day of the next term for a hearing, directing, at the same time, notice to be given to the creditors, and that on the fourth day of the next term, he was sworn and discharged, without any record being made of his appearance or non-appearance on the first day, or of any continuance of the case from day to day; particularly if the arresting creditor, or the person beneficially interested, had notice, that the debtor was not discharged on the first day of the term, and endeavoured to make an arrangement with him respecting the debt, which would render it unnecessary for him to take the benefit of the act. *Ibid.*

4. Although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law, which, as soon as the debts are satisfied, entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name; and, in the absence of proof to the contrary, this court will intend that he produced satisfactory evidence, that the debts were paid; particularly after a lapse of fourteen years. *Ross v. M'Junkin.* 364

5. A bond given by an insolvent debtor, with sureties, in order to obtain his discharge from imprisonment, by virtue of the act of the 28th of March, 1820, with condition, that "if the insolvent debtor should be and appear at the next Court of Common Pleas, then and there to make application for the benefit of the several acts for the relief of insolvent debtors, and should abide all orders of the

said court in and about the premises, then the said obligation should be void; otherwise it should remain in full force and virtue," varies substantially from the bond prescribed by the act, and is void. *M'Kee v. Stannard.* 380

INTEREST.

See LEGACY, 1, 2.

JUDGE.

1. Where a judge delivers an opinion upon matter of law, he is bound by the act of the 24th of February, 1806, section 25, if requested, to reduce his opinion, with his reasons for it, to writing, and file it; but he is not bound to reduce to writing, *his whole charge to the jury*, and file it. *Reigart v. Ellmaker.* 121
2. A judge is not bound by the act of the 24th of February, 1806, to file of record his *whole charge to the jury*. *Munderbach v. Lutz.* 125
3. Nor is he bound, at the request of the party excepting, to annex to the record a copy of the evidence taken by him, and transcribed by the party making the request. But it is the duty of the judge, if requested, to permit so much of the evidence as may be necessary to understand his opinion, to be placed upon the record. This request should be made immediately on the delivery of the opinion, and the statement of the evidence should be prepared by the counsel, and submitted to the court in the same manner as in a bill of exceptions. *Ibid.*

JUDGMENT.

See ERROR, 14.

1. After the lapse of twenty years, a judgment is presumed to have been satisfied, unless there are circumstances to account

- for the delay. *Cope v. Humphreys.* 15
2. If there are no such circumstances, it is not the duty of the court to submit the question as an open one to the jury. Satisfaction of the judgment is a presumption of law upon the facts. *Ibid.*
 3. If the original judgment was against several defendants, and on a *scire facias post annum et diem*, the return as to one of the defendants is *nihil habet*, and judgment is entered against him by default, this is not a circumstance to affect the presumption of payment. *Ibid.*
 4. Where judgment has been confessed in one county, on a bond by virtue of a warrant of attorney, the power is satisfied; and another judgment cannot be confessed on the same bond, by virtue of the same warrant, in another county. But this cannot be taken advantage of on a writ of error. The court in which the second judgment is entered, will, under ordinary circumstances, vacate it. But how far the court will exercise their discretionary power to let in the subsequent judgment of a third person, *quære.* *Neff v. Barr.* 166
 5. Where two judgments have been entered, by virtue of the same power in different counties, and an issue is directed by the court in which one of the judgments is entered, to determine whether or not that judgment be valid, the party who alleges that it is not valid, may give in evidence an entry in the docket, stating the hour and minute when the judgment was entered; if it appear from other evidence that such entry was made by the opposite party, or his agent. But *it seems*, that the burden of showing which of the judgments was first entered, properly lies on him by whom they were entered. *Ibid.*
 6. The time during which a judgment continues to be a lien upon lands, under the act of the 4th of *April*, 1798, is to be determined by the record alone, without regard to any private agreement for a stay of execution, not appearing upon the record. *Bombay v. Boyer.* 253
 7. It is not against equity, that a purchaser should insist on counting the five years from the date of the judgment, although he was informed before he made the purchase, that by the condition of the bond, or a private agreement of the parties, execution could not be issued on the judgment, until a time less than five years before his purchase. *Ibid.*
 8. A purchaser at sheriff's sale under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly subject to such prior judgment. *The Commonwealth v. Alexander.* 257
 9. Where, therefore, money is in the hands of the sheriff, arising from the sale of land under a judgment obtained against the present owner, creditors who have liens upon the land, by virtue of judgments obtained against the former owner, are entitled to payment out of this fund; and if the sheriff, instead of satisfying such liens, pays over the balance of the purchase money to the defendant in the execution, the previous judgment creditors may recover from him the amount of their respective liens. *Ibid.*
 10. Whether the judgment creditor had not lost his lien, in consequence of his attorney having

permitted the misappropriation of another fund, out of which he was entitled to payment, properly left to the jury, under the facts and circumstances of the case. *Ibid.*

11. The Court of Common Pleas has no right to set aside a judgment entered upon a verdict, without setting aside the verdict also. *Huston v. Mitchell.*

307

JURISDICTION.

See SPECIAL COURT.

JUROR.

It is good cause of challenge to a juror, that he objects himself to being sworn, because he had heard all the evidence at a former trial of the cause, and had made up and expressed his opinion on the facts then given in evidence, but says that his mind is always open to conviction on another state of facts. *Irvine v. Kean.*

292

JUSTICE OF THE PEACE.

See APPEAL. EVIDENCE, 30.

1. A justice of the peace is not presumed to be the agent of the plaintiff in a suit brought before him. Therefore a copy of the plaintiff's account, furnished by the justice to the defendant, accompanied by a note demanding payment, is not evidence against the plaintiff, on the trial of another action. *Boyer v. Potts.*
2. Under the "supplement to the act for preventing clandestine marriages," passed the 14th of February, 1729-30, only one penalty of fifty pounds can be recovered against a justice of the peace for joining two persons in marriage; and, if the parent of one party has already recovered the penalty, no action can be maintained for it by the pa-

rent of the other party. *Hill v. Williams.*

287

LEADING QUESTIONS.

A party who joins in a commission, and examines witnesses upon cross-interrogatories, cannot, upon the trial of the cause, object that the interrogatories of the other parties are leading in their character. *Overton v. Tracey.*

311

LEGACY.

1. Testator bequeathed as follows:—"Item, I give and bequeath unto my two youngest sons, each of them, the sum of four hundred pounds, to be paid for their use out of the first money which comes into the hands of my executor, out of my estate. Item, I give and bequeath unto each of the children of my daughter B. two hundred and fifty pounds, to be paid to them out of the money which may come into the hands of my executor, after the legacies are paid to my said two youngest sons; but it is my will, and I order, that if any of my sons or grandchildren, to whom I have given the said legacies, should die in their minority, and without issue, then such legacy shall be divided to and amongst my six children, to whom I have given the residue and remainder of my estate."

Held, that by comparison with other parts of the will, and under the circumstances of the case, the executor was liable for interest upon the legacies to the testator's grandchildren, from the time he had sufficient funds in his hands to pay them, after payment of the other legacies, which had a priority by the will; and not merely from the time a demand was made, and

a refunding bond tendered. *Bitzer's Executor v. Hahn.* 232

2. Rules with respect to the payment of interest on legacies. *Ibid.*

LICENSE.

If a parol license be given, without consideration, to use the water of a stream for a saw mill, in consequence of which the grantee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the grantor; and if he divert the water, to the injury of the grantee, the latter may maintain an action against him. *Rerick v. Kern.* 267

LIEN.

See JUDGMENT, 6, 7, 8, 9. MECHANICS AND MATERIAL MEN.

1. The interest of a child in the land of his deceased father, continues to be real estate, after an order has been granted to the administrator to make sale of it, and until it is actually sold, and cannot, by any parol agreement, be converted into personal estate, so as to affect the lien of a third person. *Withers's Appeal.* 185
2. Therefore, a parol agreement by the son of a decedent, that his brother, who had advanced money for him, and who afterwards, as administrator of the father, obtained an order of the Orphans' Court for the sale of his real estate, should repay himself out of his brother's share of the proceeds of the land, when it should be sold, will not prevail against a judgment obtained after the agreement was made, and before the sale took place, by a third person, who had no knowledge of the agreement. *Ibid.*

LIMITATIONS, ACT OF.

1. It is settled law, that the ac-

knowledge of a debt, subsisting at the time of the acknowledgment, is sufficient evidence from which to infer a promise to pay, and to take the case out of the act of limitations; unless it be accompanied by words or explanations inconsistent with such a promise. A letter, therefore, written by defendant, asserting that there was once a debt, that it had been paid, and explaining how it had been paid, will not take the case out of the act of limitations, even if it can be proved that the defendant was mistaken in supposing it had been satisfied in the manner alleged. *Bailey v. Bailey.* 195

2. The act of limitations does not begin to run against a parol guarantee of the sufficiency of a mortgage, given to secure a bond payable by instalments, and of the solvency of the mortgagor, until six years after the last instalment has become due. *Overton v. Tracey.* 311
3. The possession of the *cestui que trust* becomes adverse, and the act of limitations begins to run from the time the legal title is conveyed in violation of the trust. *Scott v. Gallagher.* 333
4. If money be received as a deposit for a special purpose, and the party who receives it, instead of applying it to that purpose, use it, he cannot set up the act of limitations as a bar to a recovery by the party entitled to it. *Johnston v. Humphreys.* 394

MARRIAGE.

See JUSTICE OF THE PEACE, 2.

MECHANICS AND MATERIAL MEN.

A person, who, on furnishing bricks for the erection of a building, agrees to be paid part in cash, and "the balance in

lumber at fair prices, whenever called for out of S's. lumber yard," and accepts the guarantee of S. for the performance of the contract, does not lose his lien upon the building, given by the act of the 17th of *March*, 1806. *Hinchman v. Lybrand*. 32

MERCER, BOROUGH OF.
See QUARTER SESSIONS, COURT OF.

MONEY HAD AND RECEIVED.

See ACTION, 2, 3.

MORTGAGE.

See EJECTMENT.

NEGRO AND MULATTO,

See SERVANT.

NOTICE.

See ASSUMPSIT, 2. EVIDENCE, 16, 24. TRUST.

1. In a feigned issue, to try the validity of a judgment assigned to the plaintiff, entered by warrant of attorney upon a bond, it is not error to charge the jury, that if the person, who at the time was the proprietor of the bond, after having entered judgment upon it, had agreed not to enter judgment, and declared to the obligor that no judgment had been entered, the effect of such agreement and declaration would be, to render the judgment null and void, and that it would be a fraud to proceed on the judgment under such circumstances; provided the assignee had notice of such agreement before the assignment. *Kellogg v. Krauser*. 137

2. But it is not necessary, in order to be affected by the agreement, that the assignee should have notice on record, or even in writing. *Ibid*.

3. Notice in any way is sufficient,

provided it be full, and such as could leave the party in no reasonable doubt. *Ibid*.

NOTICE OF SPECIAL MATTER.

See EVIDENCE, 7, 8.

OFFICIAL BOND.

See BANKS, 1, 2, 5.

1. The remedy given by the act of the 5th of *March*, 1790, upon a sheriff's official bond, is not cumulative to that of the act of the 27th of *March*, 1713, but precludes a proceeding under that act. *Shaeffer v. Jack*. 426
2. An action cannot be maintained on a sheriff's official bond, taken under the act of the 28th of *March*, 1803, in the name of the Commonwealth alone, for any injury done to an individual, by the official misconduct of the sheriff: nor can the court before which the cause is tried, permit the declaration to be amended, by the introduction of the name of the individual, as a party, so as to make it a suit for his use. *Dunn v. The Commonwealth*. 431
3. A certified copy of a sheriff's official bond is not evidence, if it does not appear to have been taken by the Recorder of Deeds, in the manner prescribed by law. *Ibid*.

ORPHANS' COURT.

See ADMINISTRATION ACCOUNT.
EVIDENCE, 11. LIEN.

1. A recognizance entered into in the Orphans' Court, by the son of a testator, conditioned for the payment, to his other children, of their shares of a certain real estate, which the testator by his will directed should be appraised on the arrival of the son at the age of 21 years, and that if he chose to take it at the ap-

praisement he might do so on giving security to the other children of the testator, is not within the provisions of any act of assembly, and no action can be supported upon it. *President of the Orphans' Court of Dauphin County v. Groff.* 181

2. If the land for which a recognizance is given in the Orphans' Court, is sold under an order of that court for the payment of debts, it is a good defence to an action on the recognizance.

Ibid.

3. A decree of the Orphans' Court, unreversed and unappealed from, cannot be questioned in a collateral suit, except in cases of fraud, or where the defect plainly appears on the face of the proceedings. And where a party relies upon fraud, it ought to be distinctly and positively alleged, and not inferred merely from circumstances.

Ibid.

PARTNER.

See SET-OFF.

PARTNERSHIP.

See WITNESS.

PAROL EVIDENCE.

1. In a suit upon a bond, given for a pre-existing debt, due to the plaintiff by a third person, parol evidence is not admissible to show, that at the time it was executed the obligee declared, that he would require nothing more than the interest to be paid during his life, and that at his death the bond should become null and void; unless the obligor was induced by such declarations to execute the bond. *Hain v. Kalbach.* 159
2. Parol evidence is admissible, to show that a particular clause was inserted in an article of

agreement by mistake. *Hamilton v. Asslin.* 448

PAYMENT.

See PROMISSORY NOTES.

PLEADING.

See ERROR, 19.

1. Coverture may be pleaded in abatement or in bar, according to circumstances. *Steer v. Steer.* 379
2. In an action of debt on a bond, executed by the defendants directly to the plaintiff, during her coverture with one of them, coverture is a plea in bar. *Ibid.*

PRESUMPTION.

See JUDGMENT, 1, 2. 3.

PROMISSORY NOTES.

See DEFALCATION. EVIDENCE, 1, 10, 11. STATEMENT.

Giving a promissory note for the sum required by the act of assembly of the 22d of February, 1812, incorporating the President, &c. of The *Susquehanna and Waterford Turnpike Company*, to be paid in money, at the time of subscription, is not a payment of money within the meaning of the act. *Leighty v. The Susquehanna and Waterford Turnpike Company.* 434

QUARTER SESSIONS, COURT OF.

See ROADS, 3.

The act of the 28th of March, 1814, erecting the town of *Mercer*, and the out lots belonging to it, into a borough, does not vest in the borough officers the power to lay out streets through the out lots, but leaves that power in the Court of Quarter Sessions. *Case of the Road from, &c., in the Borough of Mercer.* 447

QUO WARRANTO.

The granting an information in

the nature of a *Quo Warranto*, is discretionary with the court; and *it seems* that it will not be granted, when it cannot be brought to trial before the expiration of the office to which it refers. *Commonwealth v. Reigart*. 216

RASURE.

1. Where a bond contains a rasure, it is for the jury to decide, upon the evidence, whether it is the identical contract declared on or not. But the law views the alteration of such an instrument with a jealous eye, and requires satisfactory evidence to be given by the obligee that the alteration, if in a material part, was made without his consent; or, if with his consent, that the consent of all the parties in interest was also given. *Barrington v. The Bank of Washington*. 405

2. Where the obligee makes it a part of his case that the bond was in his possession, with the names of all the obligors to it, and afterwards brings suit upon it, omitting one of the obligors, whose name appears to have been erased from the bond, it is an admission that the alteration was made with his consent; and it lies upon him to show that it was made with the consent of all the other parties in interest. *Ibid*.

RECOGNIZANCE.

See ORPHANS' COURT, 1, 2. RELEASE.

Where the defendant appeals from an award of arbitrators in favour of the plaintiff, *for a sum of money*, it is sufficient if the condition of the recognizance be either "that if the plaintiff in the event of the suit, shall obtain a judgment for a sum equal to, or greater than the report of the

arbitrators," or, that "if the plaintiff in the event of the suit shall obtain a judgment as or more favourable than the report of the arbitrators," the defendant shall pay, &c. without inserting both conditions. *Ayres v. Fisher*. 112

RELEASE.

See ASSIGNMENT.

1. Where several distinct parcels of real property are taken at a valuation, by one of the heirs of a decedant, and a recognizance is entered into in the Orphans' Court, to secure the proportions of the other heirs, a release of one of those parcels from the lien of the recognizance, does not operate as a release of the whole. *Reigart v. Ellmaker*. 121
2. A release by two lessees, will not bar an action against the landlord by a third, unless it appear that the covenant was joint; and this the party alleging that it was, must show. *Eisenhart v. Slaymaker*. 153

REPLEVIN.

See SET-OFF, 2.

REPLEVIN BOND.

See SHERIFF, 1.

RIVERS.

See SCHUYLKILL NAVIGATION COMPANY. SCHUYLKILL RIVER.

The rivers of *Pennsylvania* are not subject to the common law rule, that all fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the property of the soil, and consequently the right of fishing *usque ad filum medium aquæ*, and the owners of the other side the rights of soil and fishing *ad*
3 O

filum aquæ on the other side, and that he who owns both sides, is the owner of the whole river, and has the exclusive right of fishing, according to the extent of his shores. *Shrunk v. The Schuylkill Navigation Company.* 71

ROADS.

1. Re-reviewers are not restricted to a simple approbation or rejection of a road as originally reported, but may return a different one. *Case of a Road in Abington Township.* 31
2. Re-reviewers are not bound to return a draft of the road which they are directed to re-review, but may return only a draft of that which they themselves recommend. *Ibid.*
3. The Court of Quarter Sessions has no right to make a material alteration in the report of viewers of a road, because it appears that the surveyor has not pursued the directions of the viewers. *Case of a Road from Herr's Mill.* 204

SCHUYLKILL RIVER.

See SCHUYLKILL NAVIGATION COMPANY.

By the erection of *Fairmount* dam, in the river *Schuylkill*, a rock just below the dam, which had formerly been private property, and above low water mark, became surrounded at all times by water, and was dry only at low tide, and a few hours before and after: *held*, that it still remained the property of the former owner, and that it was not common property, where all persons might stand and fish with hoop nets. *The Commonwealth v. Shaw and others.* 9

SCHUYLKILL NAVIGATION COMPANY.

The owner of land fronting on the

river *Schuylkill*, above tide waters, who had the exclusive right of drawing seines on his own land, is not entitled to damages under the act of the 8th of *March*, 1815, incorporating the president, managers, and company of the *Schuylkill Navigation Company*, for an injury sustained in consequence of the erection of a dam across the river by the said company, by reason of which, shad, herring and other fish, were prevented from passing up the river. *Shrunk v. The Schuylkill Navigation Company.* 71

SERVANT.

The child of a servant until the age of twenty-eight years, cannot be held to servitude for the same period, and on the same conditions as its mother, who was the daughter of a registered slave. *Miller v. Dwilling.* 442

SET-OFF.

1. In an action by A., the defendant cannot set off an account for goods sold to A. and B. as partners. *McDowell v. Tyson.* 300
2. Where the parties in replevin are at issue on the point of rent in arrear or not, the plaintiff cannot give in evidence a set-off against his landlord. *Anderson v. Reynolds.* 439

SETTLEMENT.

1. Whether a right to an island in the *Susquehanna* could be acquired by settlement and improvement in the year 1749, *quære?* *McElear v. Elliott.* 242
2. If it could, *quære* whether such a title, without warrant or survey, is embraced by the 5th section of the act of the 26th of *March*, 1785, where the settler was in possession at the date of the act? *Ibid.*

3. A deposition, proving a settlement and improvement on an island in the *Susquehanna*, by the persons under whom the plaintiff claims, in the year 1749, and a possession continued upwards of fifty years, accompanied by a warrant issued in the year 1760, and a survey returned in the year 1763 for the use of the late proprietaries, is admissible in evidence, against a defendant who shows no title; without having previously given evidence connecting the plaintiff with those by whom the settlement was made. *Ibid.*

SHERIFF.

See OFFICIAL BOND. JUDGMENT, 8, 9, 10.

The sheriff is answerable for the sufficiency of sureties in a replevin bond, at the termination of the suit. It is not enough that they were sufficient when they were taken. *Pearce v. Humphreys.* 23

SHERIFF'S SALE.

See JUDGMENT, 8, 9.

SLANDER.

See EVIDENCE, 20, 21, 22.

SLAVE.

See SERVANT.

SPECIAL COURT.

Where the presiding judge of a Court of Common Pleas regularly certifies a case for trial to a special court, on the ground of an alleged interest in himself, and the parties go on to trial without objection to the jurisdiction, this court will not, in a doubtful case, sustain an exception to the jurisdiction of the special court, though it appear from the certificate of the judge, that in his own opinion, he had no interest, and though

this court should be of opinion that he was not disqualified, on account of interest, from being a witness in the cause. *Barrington v. The Bank of Washington.* 405

STATEMENT.

In an action on a promissory note against the administrator of the drawer, a statement filed under the act of 21st of *March*, 1806, setting forth a copy of the note and claiming the principal and interest due upon it, is sufficient, without averring a promise to pay by either the intestate or the defendant. *Bailey v. Bailey.* 195

SURETIES.

See BANKS, 1, 2. SHERIFF, 1. WITNESS, 2.

TAXES.

1. Sales of unseated lands for taxes, in the counties of *Beaver* and *Butler*, under the act of the 26th of *February*, 1817, are subject to the provisions of the act of the 13th of *March*, 1815: consequently, the omission of notice, required by the act of 1817, does not vitiate the sale. *Thompson v. Brackenridge.* 346
2. The purchaser of unseated lands sold for taxes, is bound to pay only the amount of his bid, and not, in addition thereto, the prothonotary's fee for entering the acknowledgment of the deed. The taxes and costs, including the prothonotary's fee, are to be paid to the treasurer, and the surplus bond taken for the balance of the purchase money. *Turk v. McCoy.* 349

TOWNSHIP, DIVISION OF A.

If the Court of Quarter Sessions on a petition for the division of a township, under the act of the

24th of *March*, 1803, make an order appointing three men to make a plot or draft of the said township and the division line proposed to be made, and from their return it does not appear that they made any inquiry into the expediency of granting the prayer of the petition, the proceedings are erroneous. *Case of Macungie Township.* 67

TREASURER.

The 3d section of the act of 12th of *April*, 1825, requiring each and every county treasurer to settle his accounts before the second *Tuesday* in *December* in each and every year, is confined to treasurers appointed after the 1st of *January*, 1826. *Commonwealth v. Reigart.* 216

TRESPASS.

1. If, on a distress for rent, the goods distrained upon are sold without having been appraised and advertised, agreeably to the act of the 21st of *March*, 1772, the distrainer is a trespasser *ab initio*, and an action of trespass *quare clausum fregit* may be maintained against him. *Kerr v. Sharp.* 399
2. In trespass *quare clausum fregit*, the omission to declare that the defendant *unlawfully* broke the plaintiff's close, &c. is cured by verdict. *Ibid.*

TRUST.

See LIMITATIONS, ACT OF, 3.

The *bona fide* purchaser of the legal title, is not affected by a secret trust, of which he has not direct, express, and positive notice. The possession of a *cestui que trust*, and the exercise by him of every act of ownership, is not such notice. *Scott v. Gallagher.* 333

UNSEATED LANDS.

See TAXES.

VACATING WARRANT.

1. In an ejectment for land west of the river *Allegheny*, claimed by the plaintiff under a warrant and survey, without settlement, the defendant has a right to show that the legal title has been granted to him by the commonwealth, without having shown that he had taken out a vacating warrant, agreeably to the act of the 3rd of *April*, 1792. *Riddle v. Albert.* 341
2. *Query*, Whether a vacating warrant be essential, where it appears that when the settler was about to make his settlement, he was assured, upon inquiry of the deputy surveyor of the county, that there had been no prior appropriation of the land. *Ibid.*

VARIANCE.

See ERROR, 3.

VERDICT.

See EVIDENCE, 28. TRESPASS, 2.

WARRANT AND SURVEY.

See ERROR, 16, 17. EVIDENCE, 23, 24, 25.

1. Where two warrants to different persons are surveyed together, and a general diagram of surveys returned, without a division line, or any thing to designate each tract, the grantees are not tenants in common of the whole. Their rights, as between themselves, are suspended, until the subject of the grant to each shall be specifically designated by the proper officer, or by themselves; and, when that is done, the title of each relates to the commencement of the grant, and each may recover for himself. *Ross v. M^r Junkin.* 364

2. After a warrant has been executed, but before a return, a new survey may be made on vacant lands, without a new authority; provided the warrantee agrees to accept it, and it does not interfere with the intervening rights of third persons. *Vickroy v. Skelley.* 372

WAIVER.

See ATTACHMENT, FOREIGN. ERROR, 19.

WILL.

The construction of a will, obscurely and incoherently worded. *Roberjot v. Mazurie.* 42

WITNESS.

See BANKS, 4.

1. Whether one who has a share in the profits of a commercial firm, under an agreement not to be liable for losses, be a dormant partner or not, and, as such, answerable for the debts of the firm, he is not a competent witness for the firm in an action in which they are plaintiffs, unless he has executed a release of all his interest in the suit; in which case he is competent, because, admitting his liability for debts, his interest is too remote to affect his competency; provided there be no evidence of the inability of the other partners to pay the debts

of the firm. *Curcier et al. v. Pennock.* 51

2. *W.* was bound as surety for *R.*, in a bond to *M. R.*, having brought suit against *S.*, *S.* paid to *M.* the amount due on *R.*'s bond to him, and took the bond with a view to set it off in the suit brought against him by *R.*, and an agreement was indorsed upon the bond, that the money should be repaid by *M.*, if the set-off was not allowed. On the trial of the action, upon the agreement, brought by *S.* against *M.* to recover back the money paid by the former to the latter, in which the principal question was, whether the set-off had been allowed, *W.*, the surety, was held not to be a competent witness for the defendant, being directly interested in the event of the suit. *Reigart v. Hix.* 134
3. The creditor of a deceased person may be a witness for his personal representative, where it does not appear with certainty that the estate is insolvent. *Boyer v. Kendall.* 178

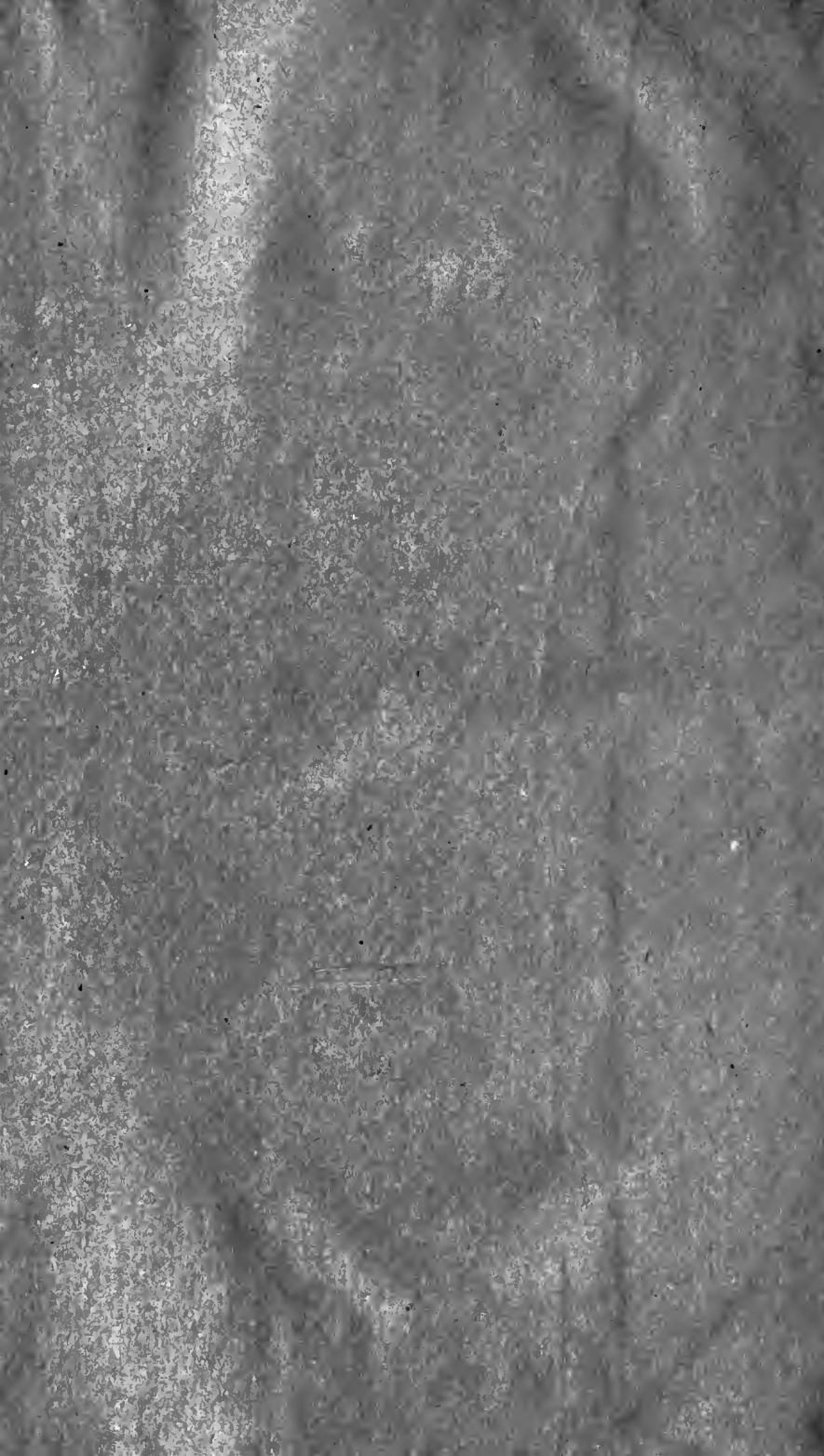
WRIT OF ERROR.

See AWARD, 1, 2.

This court will not, in general, proceed upon a writ of error, contrary to the agreement of the parties; but the rule is not applicable to the case of a judgment of imprisonment for life. *Smith v. The Commonwealth.* 69

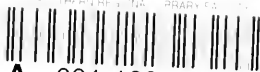






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